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“A” IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1947, at New Orleans, Louisiana, before the Honorable Joseph C. Hutcheson, Jr., the Honorable Edwin R. Holmes, and the Honorable Leon McCord, Circuit Judges:

No. 10501.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *Petitioner*,

versus

FEDERAL POWER COMMISSION, LOUISIANA-PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA, *Respondents*.

BE IT REMEMBERED, That heretofore, to-wit, on the 22nd day of December, A. D. 1947, a motion was filed by Interstate Natural Gas Company, Incorporated, appellant, for an Order for Distribution of Funds in the above entitled cause, which motion and pleadings in connection therewith and proceedings are as follows, to-wit:—

1 In the United States Circuit Court of Appeals

*Order Granting Stay—Filed June 14, 1943.*

This matter comes before the Court upon the petition of Petitioner, Interstate Natural Gas Company, Incorporated, to review an Order of the Federal Power Commission and the prayer therein for a stay of the Order of said Commission entered April 27, 1943, as modified by orders entered May 11, 1943 and June 9, 1943 in causes G-132 and G-149 on the docket of said Commission pending review of said Order by this Court, a copy of which Order is attached to said petition as Exhibit “A”, and modifications thereof are attached to said petition as Exhibits “B” and “C”.

It appearing that each of the Respondents herein have been notified of this hearing and counsel for each has been furnished

with a copy of the petition filed herein and all parties having been heard, the Court hereby orders that said Order of the Federal Power Commission, as modified, ~~be~~ and the same hereby is stayed and suspended until the further Order of this Court, upon the conditions following:

2        1) The monthly difference between payments to Petitioner under existing rates or arrangements and those required under the Order of the Commission shall be promptly paid into the registry of this court under the provisions of Sec. 995 of the Revised Statutes of the United States (28 U. S. C. A. 851). For gas billed in any particular month the deposit shall be made not later than the 30th day of the succeeding month, the first deposit to be made not later than July 30th, 1943 for the month of June 1943.

The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act. Upon receipt of each deposit the Clerk of this Court shall notify the Federal Power Commission stating the amount of such deposit and the total amount then on deposit in said fund.

2) The entire expenses of impounding these funds shall be borne by Petitioner.

3) No interest shall be charged Petitioner upon such impounded funds unless allowed upon application hereafter made by Respondents or any of them. Such future applications may be made only

a) if and when Petitioner fails to prosecute this error proceeding with due diligence, or

b) ~~if and when this Court shall enter its decree and order sustaining the above Order of the Commission and shall deny any petition for rehearing which may be filed thereto.~~

Any interest allowed hereafter shall be at such rate as will be fixed by further Order of the Court.

4) Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds.

IT IS FURTHER ORDERED that the Clerk of this Court is directed to transmit a copy of this order to each of the parties to this proceeding or to their counsel.

O. K. as to form:

(Signed) EDW. H. LANGE  
*Attorney for Respondent,  
 Federal Power Commission*

(Signed) NAT B. KNIGHT  
*La. Pub. Serv. Comm.*

(Signed) EDWARD RIGHTOR  
 " FRANCIS P. BURNS  
 " WARREN O. COLEMAN  
*Attorneys for The City of  
 New Orleans*

(Signed) ALDEN T. SHOTWELL  
 " HENRY P. DART, JR.  
 " H. GRADY PRICE  
*Attorneys for Petitioner*

Dated: June 15, 1943.

Approved for the Court

(Signed) E. R. HOLMES  
*Presiding Judge.*

4 In the United States Circuit Court of Appeals for the  
Fifth Circuit

No. 10701

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *Petitioner*,  
VERSUS

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA, *Respondents*.

Petition for Review of an Order of the Federal Power Commission,  
Washington, D. C.

(August 3, 1946.)

Before SIBLEY, HUTCHESON and WALLER, Circuit Judges.

*Opinion of the Court—Filed August 3, 1946.*

5 *HUTCHESON, Circuit Judge:* The proceeding under review here was brought under Section 5(a)<sup>1</sup> of the Natural Gas Act<sup>2</sup> as a general investigation of the reasonableness of all the rates of petitioner, subject to the jurisdiction of the commission.

Petitioner, as to all of its rates sought to be investigated, denied that any of them were unreasonable, and as to sales of natural gas, made by it in the Monroe Gas Field to certain pipe line companies,<sup>3</sup> it insisted that the rates and charges were not within the jurisdiction of the commission, that, indeed, as part of the production and gathering of the gas, they were by the statute expressly withdrawn from its jurisdiction.

The Commission found that all of the sales to these companies were "sales of natural gas in interstate commerce for resale for

<sup>1</sup> Sec. 5(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State Commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

<sup>2</sup> 52 Stat. 821, 15 USC, Sec. 517.

<sup>3</sup> Mississippi River Fuel Corp.; Southern Natural Gas Co.; United Gas Pipe Line Co.; for account Memphis Natural Gas Co.

ultimate public consumption" within the meaning of Section 1(b),<sup>4</sup> the jurisdictional section of the act, and that the charges made were unreasonable. Its order required reductions in these rates from 7.39¢ to 4.66¢ per M.e.f.

Petitioner is here complaining: (1) that the sales were not within, but were expressly excluded from, the jurisdiction of the commission; and (2) that the order as to them is confiscatory. In

6 support of its first position, it relies not only on the language of the act, but on what it calls "authorized statements of commission representatives," and "legislative history".

In support of its second position it points to the fact that the charges the order fixed as reasonable are considerably less than the average price, 5.5¢, which petitioner pays for gas purchased by it in the field, and that 1.1¢ must be added to this as gathering costs. Thus for gas which cost it 6.6 cents, the order allows it to charge only 4.66 cents.

In answer to petitioner's first position, the Commission points to the precise language of the section, that the provisions of the act "shall apply to the sale in interstate commerce . . . for resale for ultimate public consumption . . ."; to the undisputed fact admitted by petitioner that the sales the order deals with are in interstate commerce; to the legislative history of the act in question as distinguished from the history of prior acts introduced but not enacted into law, on which petitioner relies; and to *Peoples Natural Gas vs. The Commissioner*, 123 F(2) 153; and other cases which it claims support its view.

As to petitioner's second point, that the order was confiscatory, the Commission invokes the settled principle that the rate order must be viewed not piecemeal but in its entirety, that, in short, if as a whole the order affords just compensation, the fact that some particular rate in the schedule of rates, viewed by itself alone, may appear to be low, is immaterial. Basing on that principle, it points to the admitted fact that the rate schedules as a whole established by the order are producing a 6.5% return on the rate base fixed. As to the precise rates, the Commission insists that since petitioner operates an integrated pipeline system in which both produced and purchased gas are commingled and disposes of a great part of its gas to others than these pipelines in question, there is no way of knowing just what is the source of the

7 4 Sec. 1(b) of the Natural Gas Act provides:

"The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."



gas delivered to petitioner's pipeline customers. By figures it demonstrates that the cost of the gas produced is less than the 4.66¢ allowed, and it insists that it is not, and cannot be, made to appear that that charge even by itself is confiscatory.

We agree with the Commission that the rates are within its jurisdiction and that petitioner has failed to show that they are confiscatory.

Disposing first of the question of compensation, we need not inquire whether, if it stood alone, the rate allowed would be confiscatory. It is sufficient to say that the Commission is correct in its position that the rate order must be viewed in its entirety, and that "it is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act is at an end". *Federal Power Comm. v. Hope Natural Gas*, 320 U. S. 591; *Panhandle v. Federal Power*, 324 U. S. 735; *Cities Service Co. v. Federal Power Comm.*, 10th Circuit, April 30, 1946.

On the jurisdictional point, we think the language employed in the bill as it finally passed, "The provisions of this act shall apply to the sale in interstate commerce of natural gas for resale for ultimate public consumption, and to natural gas companies engaged in such transportation or sale" leaves in no doubt that the sales in question are within its purview. That they are sales in interstate commerce, we think is settled by the authorities.<sup>5</sup> That the gas was sold for resale for ultimate public consumption, we think may not be doubted. This being so, the exception of the statute that it shall not apply to "any other \* \* \* sale of natural gas" is unavailing to petitioner, for if the sale is the kind named in the first quoted clause, it certainly cannot be "any other sale".

We think petitioner's difficulties in construction and interpretation arise out of the fact that, treating unlike things as alike, it tries to read the exception with respect to production or gathering as an exception with respect to sales. There is no warrant in the act for so doing. It is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. No conflict with them will, therefore, be found unless the conflict is clear and inescapable and then only in the precise point of the conflict. *Cf. Hartford v. Federal Power*, 131 F(2) 933. Here the statute was drawn to regulate, it picked out for inclusion "sales in interstate commerce of natural gas for

<sup>5</sup> *Missouri v. Kansas Gas Co.*, 265 U. S. 298; *Public Service Comm. v. Attleboro Steam & Elec. Co.*, 273 U. S. 83.



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resale for ultimate public consumption". It excluded from the scope of the act sales other than of this kind. It included transportation in interstate commerce. It excluded local distribution of natural gas.

Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply "to the facilities used for such [i.e. local] distribution or to the production or gathering of natural gas."

In *Peoples Natural Gas Co. v. Federal Power Comm.*, 127 F(2) 153, the court found that a sale in Pennsylvania to an interstate pipeline company which immediately transported it to New York was a sale of natural gas in interstate commerce for resale, and, so finding, held that the provision that the act did not apply to production or gathering did not limit the commission's jurisdiction over such sales.<sup>6</sup>

In the Canadian River Gas case, 324 U. S., at pp. 602-3, the Supreme Court rejected the argument which petitioner advances here that unless the meaning it contends for is given to the provision with respect to gathering and distribution, that provision will be meaningless. It said:

"That does not mean that the part of Sec. 1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. We only decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction."

A careful reading of petitioner's brief, especially of that portion of it devoted to the legislative history, shows that its difficulties flow from the fact that it does not distinguish between the Lea Bill, House Bill No. 11,662, proposed in 1936, but never passed,

<sup>6</sup> Cf. *Missouri v. Kansas Gas Co.*; *Public Service Comm. v. Attleboro Steam & Electric Co.*, supra.

and the bill which became the law now under review. Legislative history cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. \* \* \*. If the language be clear, it is conclusive. *People's Natural Gas Co. v. Federal Power Comm.*, *supra*, quoting from *United States v. Shreveport Grain Co.*, 287 U. S. at page 83. Certainly the legislative history of a bill that was not adopted cannot be resorted to to construe a bill that was.

It is quite plain that from the time the Lea Bill was introduced until the Natural Gas Act was passed, the ideas of the proponents of the legislation underwent considerable change. The purpose of the Natural Gas Act, as shown in the Senate and House Committee reports, which are identical, was to provide for the regulation of natural gas companies transporting and selling natural gas in interstate commerce. Its proponents were not interested in the production of gas or the individual sales of gas at the well. Nor were they interested in gathering of the gas in the field. What they were interested in, as the report in terms states, what they were trying to reach, was wholesale sales of gas. Says the report:

"There is no intention in enacting the present legislation to disturb the states in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales in interstate commerce, (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character, and, even in the absence of congressional action, not subject to state regulation. (See *Missouri v. Kansas Gas Co.*, (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.*, (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

It would be difficult to conceive language better adapted to achieve this purpose than the language of the act in question here. It would be difficult to find a case more clearly illustrating the mischief which the act was supposed to remedy, more fittingly applying the remedy. The statute expressly provides that "it shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale \* \* \*". It is conceded that Interstate is a natural gas company engaged in interstate transportation and

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sale, and it is further established that it, in *Interstate Natural Gas Co. v. Public Service Comm.*, 33 Fed. Supp. 50, 34 Fed. Supp. 980, successfully contended in the Federal Court that sales to the pipelines, in question were sales in interstate commerce and beyond the reach of the State Commission. This is not to say that its success in so contending would estop it from claiming the contrary here or that the decision it obtained there is controlling here. It is to say though that the position it took and the decision it obtained give force and color to the avowed purpose of the Natural Gas Act as House and Senate Committees stated it, and that it seems clear to us that it would be difficult to find a case falling more clearly within both the purpose and the language of the act. Cf. *Missouri v. Kansas Gas Co.*, *Public Service Comm. v. Attleboro Steam & Electric Co.*, *Supra*. The record shows no ground for setting aside or modifying the order. The petition for its review is DENIED.

13                                    *Dissenting Opinion*

WALLER, Circuit Judge, dissenting: In order to set out my views more clearly on this controversy I shall state some facts in addition to those set forth in the main opinion.

Petitioner owns 110 producing gas wells and controls 56,555 acres of natural gas lands in the Monroe Gas Field of Louisiana. It gathers the gas from its wells and also that which it buys from other wells, and, through its own pipe lines, transports same to points within the State of Louisiana where it is delivered to interstate pipe line companies which it then transport the gas to individual customers and to utilities in other states which then sell the gas to the ultimate consumer. It is the price received in Louisiana for gas, produced in Louisiana, gathered in Louisiana, sold in Louisiana, delivered in Louisiana, and to which all right, title, and interests passes in Louisiana, that the Commission has fixed in the order here under review.

Before the gas is transported by the interstate pipe line companies it is first compressed, and its continuous transmission is thus temporarily arrested as it is made ready for its journey in interstate transportation.

Petitioner, of course, knows that the gas which it produces, gathers, and sells will be transported by the purchasers in interstate commerce by whom it will be sold directly to the ultimate consumers or to the owners of distribution systems who will, in turn, sell it to ultimate consumers, in other states.

In another phase of Petitioner's business it transports and sells some of its gas to points in Louisiana by a pipe line, which, however, runs through a portion of the State of Mississippi.

14

This activity is definitely in interstate commerce, regulable, and regulated, by the Commission, but it, admittedly, is not in issue here. The appeal is from the order of the Commission reducing the selling price in Louisiana of Petitioner's gas to certain interstate pipe line companies from 7.39¢ to 4.66¢ per thousand cubic feet.

Petitioner is in no wise affiliated with any of these purchasers of its gas, as was the situation in *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153, and in *Illinois Gas Co. v. Public Service Company*, 314 U. S. 498. In neither of those cases was the Appellant a producer of natural gas as is Petitioner in the case at bar.

The Act by its terms applies: (1) to transportation in interstate commerce of natural gas; (2) to the sale of natural gas in interstate commerce for resale for ultimate public consumption; and (3) to natural gas companies engaged in interstate transportation or sale of natural gas.

In *Phillips Petroleum Company v. Ochsner*, 146 F. 2d 138, this Court [footnote 1] noted that under the natural gas contracts in force in the Panhandle Gas Field of Texas "the producer is required to gather the gas at the well and deliver it into the main pipe-line of the pipe line company under certain required pressures." In the present case, Petitioner gathers and delivers its gas to the interstate pipe lines.

15 It seems that the gathering and transporting to market, are necessary incidents to the production of gas, for there can be no sustained production unless the gas can be collected and carried to market. "Transportation and sale do not include production or gathering." *Colorado Interstate Co. v. Federal Power Commission*, 324 U. S. 581; text 598.

Congress refused in the Act to confer upon the Federal Power Commission the right to regulate the production, or the power to regulate the gathering, of natural gas. The view seems to be quite reasonable that it did not undertake to regulate the gathering of natural gas because it, doubtless, recognized that gathering was a necessary incident to production—a purely local activity. We do not have here a case where the producer is admittedly regulable, whose producing and gathering facilities must be taken into account in the over-all pattern of rate making, as in *Colorado Interstate Co. v. Federal Power Commission*, *supra*.

Without doubt, had Congress desired to exercise the full extent of its power in the regulation of interstate commerce in natural gas, it could have empowered the Commission to regulate, as isolated activities, also the production and gathering of natural gas when same is produced or gathered with knowledge that sale, shipment, and delivery in interstate commerce was intended, as it did, for example, in Sec. 15a of the Fair Labor Standards Act [Sec.



215a (1), Title 29, U. S. C.]. Congress could easily have given the Act a broader scope by conferring the power upon the Commission to regulate any operation or movement of natural gas which might retard its commercial industrial use, or which might otherwise adversely affect interstate commerce. It could have made the Act applicable to any facilities that *affect* interstate transportation as in the Federal Employers' Liability and Interstate Commerce Commission Acts. It could have defined interstate commerce in natural gas so as to include the production, or the gathering, of natural gas for commerce to the same purpose and extent as was done in the Fair Labor Standards Act wherein "goods produced for commerce" were placed within the coverage of the Act. Instead of doing that, Congress expressly stated that the provisions of the chapter should be applicable only to three specific situations, viz., the transportation in interstate commerce, the sale in interstate commerce for resale for ultimate public consumption, and to natural gas companies engaged in such transportation or sale. After outlining the scope of the Commission's power, Congress then set out the restrictive enactment that the Act should not apply to any other transportation or sale of natural gas nor to the local distribution of natural gas, nor the facilities used for such local distribution, nor to the production or gathering of natural gas. The Act cannot be applicable to the production and gathering of natural gas except as the valuation of its producing and gathering facilities are inherently a part of the value that must be taken into consideration in regulating rates of natural gas companies engaged in transportation and sale of gas in interstate commerce.

17 What is meant by a "sale in interstate commerce"? The Act contains its own definition, and there is no occasion for the Court to invent one: This feature of the Act does not appear to have received attention in the majority opinion nor in *People's Natural Gas Co. v. Federal Power Commission*, *supra*, nor in *Illinois Gas Co. v. Public Service Co.*, *supra*. Sec. 717a (7), Title 15, U. S. C., defines "interstate commerce" to mean "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof. \* \* \*". This unapplied definition presents the main point of divergence between my views and those of the majority. The sale made by the Petitioner here was not between any point in the State of Louisiana and any point outside of Louisiana. It was not a contract of sale in Louisiana with delivery of the commodity to be in another state. The sale was made and the title passed in Louisiana. Petitioner had no further right, title, interest, or concern in such gas after the delivery to the purchaser. Nor did its interstate pipe line pur-

chaser have any further obligation to Petitioner to carry or to safely deliver, the gas which Petitioner had delivered to it. There was no continuity of responsibility or liability for the subsequent and safe carriage of the gas as is the case in ordinary movements of commodities in interstate commerce. Petitioner had no interest in what happened to the gas after its delivery to purchaser. Delivery, which is an element of every sale, was completed in Louisiana without the use of any facilities of interstate commerce. I can see no sale in interstate commerce, as defined by the Act, made by the Petitioner. True, it made a sale with knowledge that the gas was intended to be transported and sold by its purchaser in interstate commerce, but that is not a sale by it in interstate commerce within the coverage of the Act.

What is meant by "transportation in interstate commerce"? Under the definition of interstate commerce in the Act it can only mean the transportation from a point in Louisiana to a point outside that state in the carriage of natural gas. Petitioner is not a carrier of gas for hire such as would characterize it as a part of an interstate system of interstate transportation. Its function is analogous to that of a tram road, or dummy line, of a saw mill that locally hauls its own lumber to the common carrier.

The language of the Act that the provisions of this chapter shall apply "to natural gas companies engaged in such transportation or sale," does not sustain the Commission's contention in the present case because the Petitioner does not sell nor transport the gas, upon which the price is sought to be regulated, except in the State of Louisiana and, therefore, is not a natural gas company under the definition in Sec. 717a(6), Title 15, U. S. C.<sup>1</sup> The "sale of natural gas in interstate commerce for resale" means a sale, calling for delivery across state lines, to a purchaser which resells to the ultimate consumer, as, for instance, a sale by a pipe line customer of Petitioner in Louisiana to the owner of a gas distribution system in Memphis who will in turn resell it to its consumers.

19 It seems to require an artificial conjoining of phrases, or verbal manipulation, to place into the Act this interpretation by the majority:

[The Act] "shall not apply to the facilities used for such [i.e. local] distribution or to the production or gathering of natural gas."

The language of the Act is not that it shall not apply to "the facilities used for the production or gathering of natural gas".

1 "Natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Sec. 717a(6), Title 15, U. S. C.



but that it "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." "The facilities used to the production or to the gathering of natural gas" would be such an unusual or odd expression that it ought not to be ascribed to Congress. The term "facilities" can only refer to the facilities used in the local distribution of gas in cities and towns. I am unable to accept the view that the Act merely withheld from the Commission "jurisdiction over properties" or facilities of producers and gatherers.

The construction of the Act given to it by the Power Commission and the majority of this Court appears to nullify the plain intent of Congress to except from the operation of the Act the production and the gathering of gas when the producer, gatherer, and the seller, neither transports nor sells gas in interstate commerce, and when the Act nowhere gives the Commission jurisdiction to regulate the production or the gathering and intrastate transportation of gas, merely because producer or seller or gatherer knows that the purchaser of such gas will in turn transport it in interstate commerce and sell it in another state chiefly to those who will there resell it to the ultimate consumer.

Congress had the power to have regulated both the production and the intrastate gathering of natural gas when produced and gathered with knowledge that it would be transported or sold in interstate commerce in the same fashion that it did in the Fair Labor Standards Act. But in the present Act Congress wholly failed to take over the regulation of these two phases of the industry, and, in the face of the statute and in the absence of appropriate legislation they must be deemed to be only local activities.

Natural gas must be transported to market to the same extent as any other commercial production. The gathering and transporting of gas to a place of sale is as essential to the production of gas as is the drilling of a gas well. Regulation of the production of natural gas is forbidden, but if the Commission is given the power to regulate the price which the producer and gatherer receives at the end of the intrastate journey at the pipe line of the interstate purchaser, it is also given the power to regulate production. If the price which the producer and gatherer gets for the gas which he has produced and gathered is less than it costs to produce it, production will be thereby regulated indirectly, but, withal, as effectively as if Congress had expressly conferred such authority upon the Commission.

The custom in the industry is for the producer to bring his gas to the interstate pipe line for market. The farmer, for instance, who produces cotton transports it to market where, let us assume, he has previously agreed to sell it to a New

England cotton mill. He produced, gathered, and transported that cotton to market in Louisiana and even though he knew that the cotton was to be shipped to New England, he would not be engaged in the transportation or sale of cotton in interstate commerce, and, therefore, regulable, unless Congress had declared otherwise. Congress has the power to regulate enterprises which, in isolation, are purely local, provided such enterprises are determined by Congress to substantially affect interstate commerce or the free flow of goods in commerce. This Congress did not attempt to do in the statute under consideration.

Believing that courts should construe statutes instead of making them, I am unwilling to participate in writing into the Act that which Congress expressly undertook to keep out, even if by so doing a better statute would result.

22

In United States Circuit Court of Appeals

No. 10701,

INTERSTATE NATURAL GAS COMPANY, INCORPORATED,

versus

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, CITY OF BATON ROUGE, LOUISIANA.

*Judgment—Filed August 3rd, 1946.*

This cause came on to be heard on the petition of Interstate Natural Gas Company, Incorporated, for a review of the order of the Federal Power Commission, entered April 27, 1943, in consolidated proceedings entitled "Louisiana Public Service Commission, Complainant, v. Interstate Natural Gas Company, Incorporated, Defendant, Docket No. G-132"; and "In the Matter of Interstate Natural Gas Company, Incorporated, Docket No. G-149", and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the petition of Interstate Natural Gas Company, Incorporated for its review be, and the same is hereby, denied.

"Waller, Circuit Judge, dissents."

23 In United States Circuit Court of Appeals

*Mandate of Supreme Court—Filed October 21, 1947.*

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

(SEAL)

GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Fifth Circuit, in a cause between Interstate Natural Gas Company, Petitioner, and Federal Power Commission, Louisiana Public Service Commission, et al., Respondents, No. 10701, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 3rd day of August, A. D. 1946, is in the following words, viz:

“This cause came on to be heard on the petition of Interstate Natural Gas Company, Incorporated, for a review of the order of the Federal Power Commission, entered April 27, 1943, in consolidated proceedings entitled ‘Louisiana Public Service Commission, Complainant, v. Interstate Natural Gas Company, Incorporated, Defendant, Docket No. G-132’; and ‘In the Matter of Interstate Natural Gas Company, Incorporated, Docket No. G-149’, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition of Interstate Natural Gas Company, Incorporated, for its review be, and the same is hereby, denied.

‘Waller, Circuit Judge, dissents.’

24 as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES by virtue writ of certiorari, . . . . . agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of Our Lord one thousand nine hundred and forty-six, . . . . . the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and . . . . . adjudged . . . . . by this Court that the judgment . . . . . of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed.

AND IT IS FURTHER ORDERED, That this cause be, and the same is hereby, remanded to the said Circuit Court of Appeals.

June 16, 1947.

25 You, therefore, are hereby commanded that such ..... proceedings be had in said cause, ..... as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari ..... notwithstanding.

WITNESS, the Honorable FRED M. VINSON, Chief Justice of the United States, the seventeenth .... day of October ..... in the year of our Lord one thousand nine hundred and forty-seven.

(Signed) CHARLES ELMORE CROPLEY,  
*Clerk of the Supreme Court of the United States.*

26 In the United States Circuit Court of Appeals

*Motion for an Order of Distribution of Funds—  
Filed December 22, 1947*

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Interstate Natural Gas Company, Incorporated, petitioner above named, respectively shows:

1. On April 27, 1943, the Federal Power Commission entered an order, modified June 9, 1943, reducing the rates which petitioner may charge in its sales of natural gas for resale. Certain parts of said order were made the subject of a review proceeding before your Honorable Court, and pursuant to Sec. 19(c) of the Natural Gas Act (52 Stat. 833, 15 U. S. C. Sec. 717r(c)), petitioner requested a Stay of the Commission's order pending said review proceedings.

2. Your Honorable Court on June 14, 1943, granted said Stay upon the following conditions:

27 (1) The monthly difference between payment to Petitioner under existing rates or arrangements and those required under the Order of the Commission shall be promptly paid into the registry of this court under the provisions of Sec. 995 of the Revised Statutes of the United States (28 U. S. C. A. Sec. 851). For gas billed in any particular month the deposit shall be made not later than the 30th day of the

succeeding month, the first deposit to be made not later than July 30th, 1943, for the month of June, 1943.

The amounts so deposited shall remain on deposit, subject, however, to the further Order or Orders of this court, to be returned to such ultimate consumers of gas, or other persons to whom the court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act. Upon receipt of each deposit the Clerk of this Court shall notify the Federal Power Commission stating the amount of such deposit and the total amount then on deposit in said fund.

(2) The entire expenses of impounding these funds shall be borne by Petitioner.

(3) No interest shall be charged Petitioner upon such impounded funds unless allowed upon application hereafter made by Respondents or any of them. Such future applications may be made only

(a) if and when Petitioner fails to prosecute this error proceeding with due diligence, or

(b) if and when this court shall enter its decree and order sustaining the above Order of the Commission and shall deny any petition for rehearing which may be filed thereto.

Any interest allowed hereafter shall be at such rates as will be fixed by further Order of the Court.

(4) Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

3. Pursuant to said order, petitioner did and has through the month of October, 1947, so deposited in the Registry of this Court.

4. After your Honorable Court on August 3, 1946, denied the Petition for Review, petitioner secured review, on certiorari directed to your Honorable Court, by the United States Supreme Court in its Docket No. 733, October Term, 1946. On June 16, 1947, the Supreme Court affirmed the dismissal of the review proceedings by your Honorable Court; and on October 13, 1947, the Supreme Court denied petitioner's Petition for Rehearing of its order of June 16, 1947; and petitioner is informed that the mandate of the Supreme Court therein was issued and received by your Honorable Court on October 21, 1947.



5. The funds now on deposit in your Honorable Court represent moneys collected from the following:

United Gas Pipe Line Company, for the account of Memphis Natural Gas Company, Shreveport 22, Louisiana

Southern Natural Gas Company, Watts Building, Birmingham, Alabama

Mississippi River Fuel Corporation, 407 North 8th Street, St. Louis 1, Missouri

6. Gas delivered in the month of October has been billed at the rates fixed by the order of the Federal Power Commission and, therefore, no further deposit will be made.

7. Petitioner will furnish at the hearing hereon verified statements showing its computation of the amount due to each of the foregoing.

8. Petitioner is serving upon said customers and the Federal Power Commission, as well as upon those parties respondent all of whom are listed on the attached affidavit of service, notice of the filing of and a copy of this petition.

29 9. Petitioner hereby respectfully requests your Honorable Court to set the matter of the distribution of the funds paid into the Registry of the court as aforesaid for hearing and to notify the parties in interest of the date on which such matter will be heard.

10. That in the hearing hereon petitioner respectfully requests that the matter of the distribution of the funds to the three pipe line companies involved herein be fully disposed of; and that, upon a showing that all funds to which said three pipe line companies are entitled have been distributed or will be distributed thereto, that an order issue from your Honorable Court absolving petitioner from further liability in respect thereof.

11. No previous application has been made for the relief or action herein requested or similar relief or action.

**WHEREFORE PETITIONER PRAYS:**

1. That an order be issued directing the aforesaid three customers of petitioner and the Federal Power Commission to appear at a hearing in the matter of the distribution of the funds as herein set forth and that said companies, if they so desire, file on or before the said hearing date verified statements setting forth their respective claims to the distributive shares of the funds paid into the Registry of your court.



2. That as a result of said hearing, distribution of the funds as ordered by your Honorable Court be made and that upon filing by the Clerk of your court proof of said distribution, petitioner shall be forever completely absolved from further liability in respect thereof.

3. That the court grant such other and different relief in the premises as may seem just and proper.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED

By WM. A. DOUGHERTY,  
Vice President.

WILLIAM A. DOUGHERTY  
30 Rockefeller Plaza  
New York 20, New York.

AEDEN T. SHOTWELL  
Ouachita National Bank Bldg.  
Monroe, Louisiana

HENRY P. DART, JR.  
HENRY GRADY PRICE  
1008 Canal Building  
New Orleans, Louisiana

JAMES LAWRENCE WHITE  
30 Rockefeller Plaza  
New York 20, New York  
*Attorneys for Petitioner*

31 *Duty sworn to by William A. Dougherty jurat omitted in printing.*

32 *Affidavit of Service*

STATE OF NEW YORK  
County of New York ss:

Before me, a notary public in and for said county and state, personally appeared JAMES LAWRENCE WHITE, who upon being duly sworn did depose and swear that he has caused copies of the foregoing motion to be made upon each of the persons whose names appear below, by causing the same to be deposited properly addressed thereto with postage prepaid in the United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 22, Louisiana

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Mississippi River Fuel Corporation  
407 North Eighth Street  
St. Louis 1, Missouri

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Assistant General Counsel for Federal Power  
Commission, Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Edward Rightor, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Francis P. Burns, Esq.  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

33 W. C. Perrault, Esq.  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana

Original

Signed—JAMES LAWRENCE WHITE

Subscribed and sworn to before me, this 16th day of December,  
1947.

(Seal)

ANTHONY W. NEWMAN  
Notary Public

34

*Affidavit of Service*

STATE OF NEW YORK )  
 County of New York ) ss:

Before me, a notary public in and for said county and state, personally appeared WILLIAM A. DOUGHERTY who, upon being duly sworn, did depose and swear that he made service of a copy of the foregoing motion to be made upon Memphis Natural Gas Company, Memphis, Tennessee, by causing the same to be deposited, properly addressed thereto with postage prepaid, in a United States Post Office regularly maintained by the Government of the United States.

(Signed) WILLIAM A. DOUGHERTY

Subscribed and sworn to Before me this 22nd day, of December, 1947.

(Signed) ANTHONY W. NEWMAN  
 Notary Public

(Seal)

N. Y. Co. Clk's No. 27, Reg. No. 56-N-9  
 Registered in Westchester County  
 Commission Expires March 30, 1949.

35

In the United States Circuit Court of Appeals

*Motion of Memphis Light, Gas & Water Division for Leave to Intervene as Petitioner—Filed January 26, 1948*

Now comes Memphis Light, Gas & Water Division of the City of Memphis, created by Chapter 381 of the Private Acts of Tennessee for the year 1939, and moves the Court for leave to intervene as a separate petitioner in this action for the purpose of asserting its right to a distribution of a part of the funds in the custody of the Court in this cause.

For grounds of said motion, your petitioner shows that it is a branch or division of the City of Memphis, created for the purpose of purchasing and operating plants for the sale and distribution of gas, electricity and water to residents of the City of Memphis and Shelby County, Tennessee, and is now engaged in so doing; that petitioner purchases its requirements of natural gas from the Memphis Natural Gas Company, who operate a pipe line between

said city and Monroe, Louisiana, connected with other pipe lines, including those of the United Gas Pipe Line Company and the Interstate Natural Gas Company, original petitioners herein; that

36 your petitioner is owned by and is a part of the City of Memphis, Tennessee, and its citizens, the citizens of said city and Shelby County, Tennessee, being customers of your petitioner to whom it sells at retail natural gas at rates fixed by the said City of Memphis; that petitioner is not subject to regulatory control either by the Federal Power Commission or by the Railroad and Public Utilities Commission of the State of Tennessee.

Your petitioner further shows that since the entry of the order of April 27, 1943, by the Federal Power Commission, which was reviewed and affirmed by this Court in this cause, your petitioner has paid to its immediate supplier of natural gas, the Memphis Natural Gas Company, the sum of \$387,347.00, which sum has been deposited by the Interstate Natural Gas Company in this cause pursuant to this order; and that under the terms of said order it was provided:

"The amounts so deposited shall remain on deposit, subject however, to the further order or orders of this Court, to be returned to such ultimate consumers of gas or other persons to whom the Court shall find, the same shall be returned as contemplated by the provisions of the Natural Gas Act."

Your petitioner further alleges, it being owned by the citizens of the City of Memphis who are its customers, that it is the ultimate consumer of gas contemplated in said order and is the person entitled to \$387,347.00 of the funds in the hands of this Court for the reasons set out in its proposed petition of intervention attached hereto.

Your petitioner further shows that it has been advised that the Interstate Natural Gas Company has filed a motion for an order of distribution of funds in this cause, which has been set for hearing on January 28, 1948; and that representation of your petitioner's interest in said funds is or may be inadequate, and the applicant may be bound by a judgment in this action on said motion; and your petitioner is so situated as to be adversely affected by a distribution or other disposition of the property in the custody of  
37 this Court, unless its interest therein is properly presented to said Court.

WHEREFORE, your petitioner shows that it has served this motion to intervene upon all parties known to it to be affected thereby as shown in certificate of service attached hereto, and attaches hereto a copy of the petition of intervention it proposes to file for which the intervention is sought; and your petitioner prays that an order

be entered permitting it to intervene herein and file the petition of intervention so attached.

MEMPHIS LIGHT, GAS & WATER DIVISION  
*Applicant for Intervention*

By THOS. H. ALBIN  
*President*

SAMEEL S. PHARR  
*Vice President*

I. J. LICHTERMAN  
*Commissioner*

CHAS. C. CRABTREE  
WESLEY HARVELL  
*Attorneys for Applicant*

*Duly sworn to by THOMAS H. ALLEN  
jurat omitted in printing.*

39. To:

Interstate Natural Gas Co.  
c/o Wm. A. Dougherty  
30 Rockefeller Plaza  
New York 20, N. Y.

United Gas Pipe Line Co.  
Shreveport, La.  
Southern Natural Gas Co.  
Wafts Bldg.  
Birmingham, Ala.,

Memphis Natural Gas Co.  
Sterick Bldg.  
Memphis, Tennessee

Mississippi River Fuel Corp.  
407 N. 8th St.  
St. Louis 1, Mo.

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Asst. Gen Counsel for  
Federal Power Commission, Respondent  
1800 Pennsylvania Ave., N. W.  
Washington, D. C.

Edward Rightor, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, La.

Warren O. Coleman, Esq.  
Atty. for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, La.

Francis P. Burns, Esq.  
Atty. for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, La.

W. C. Perrault, Esq.  
Atty. for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, La.

Roland Kizer, Esq.  
Atty. for the City of Baton Rouge, La.  
709 Louisiana National Bank Bldg.  
Baton Rouge, La.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Court Building, City of New Orleans, on the 28th day of January, 1948, at 10 o'clock in the forenoon of that day; or as soon thereafter as counsel can be heard.

CHAS. C. CRABTREE

Attorney for Memphis Light, Gas &  
Water Division, Applicant for  
Intervention

507 Union Planters Bank Building  
Memphis, Tennessee

40

*Affidavit of Service*

STATE OF TENNESSEE  
County of Shelby

Before me, a Notary Public in and for said County and State, personally appeared Thomas H. Allen, who, upon being duly sworn, did depose and swear that he has caused copies of the foregoing motion and notice to be served upon each of the persons whose names appear in said notice by causing the same to be deposited



properly addressed thereto with postage prepaid in the United States Post Office regularly maintained by the Government of the United States.

THOS. H. ALLEN.

Subscribed and sworn to before me, this 24 day of January, 1948.

WESLEY HARVELL

My Commission expires: Oct. 2nd, 1949

41 In the United States Circuit Court of Appeals

*Petition of Intervention of Memphis Light, Gas & Water  
Division—Filed January 26, 1948*

Now comes the Memphis Light, Gas & Water Division of the City of Memphis, created by Chapter 381 of the Private Acts of Tennessee for the year of 1939, and leave of Court first having been obtained files this, its Petition of Intervention in this action for the purpose of asserting its right to a distribution of a part of the funds now in the custody of the Court in this cause.

42 Your Petitioner would show that it is a branch, or Division of the City of Memphis, a municipal corporation, created for the purpose of purchasing and operating plants for the sale and distribution of gas, electricity and water to the residents of the City of Memphis and Shelby County, Tennessee and is now engaged in so doing:

That Petitioner purchases its requirements of natural gas from the Memphis Natural Gas Company, Incorporated, who operates a pipe line between Memphis, Tennessee and Monroe, Louisiana, and the said Memphis Natural Gas Company has pipe lines connected with pipe lines of other companies including those of the United Pipe Line Gas Company and the Interstate Natural Gas Company.

That the Memphis Light, Gas & Water Division is owned by the citizens and residents of Memphis, Tennessee to whom it sells and distributes at retail natural gas at rates fixed by the City of Memphis, a municipal corporation and that neither your Petitioner nor the City of Memphis is subject to regulatory control either by the Federal Power Commission or by the Railroad & Public Utilities Commission of the State of Tennessee.

Your Petitioner would further show that the Attorney for the Federal Power Commission has furnished your Petitioner with a copy of an allocation of the money that is now being held by the Court, or which was impounded by the Court, a copy of this schedule or allocation is attached hereto and made Exhibit "A" to this Petition, and under this allocation, which purports to be an equitable distribution of the funds impounded by the Court, the Memphis Light, Gas & Water Division is entitled to \$387,347 as their prorata part of the money in excess of the rate fixed by the Federal Power Commission in their order of April 27, 1943, and which order was affirmed by this Court and the United States Supreme Court.

Your Petitioner further alleges, it being owned by the citizens of the City of Memphis who are its customers, that it is the ultimate consumer of gas contemplated in said order and is the person entitled to \$387,347 of the funds in the hands of this Court.

Your Petitioner further alleges that the rate now charged the Memphis Light, Gas & Water Division by the Memphis Natural Gas Company was fixed as a result of an investigation made by the Federal Power Commission into the earnings of and the cost paid for gas purchased by the Memphis Natural Gas Company. This investigation was made during the years of 1942 and 1943 and resulted in an order by the Federal Power Commission dated the 31st day of August, 1943, which is made Exhibit "B" to this Petition.

Supplementing the order of the Federal Power Commission, they rendered an opinion dated Sept. 21, 1943, which opinion is No. 104 of the Federal Power Commission and made Exhibit "C" to this Petition.

Your Petitioner alleges that by the wording of the opinion of the Federal Power Commission, the Federal Power Commission found the following facts:

44 "The United Gas Pipe Line Company made a reduction effective April 1, 1943, in the cost of the gas sold to the Company, as a part of its settlement in an investigation of its rates (Docket No. G-148). In its Opinion No. 90, in that docket, the Commission called to the attention of companies receiving reductions in cost of gas, the obligation to "pass on" this reduction to their customers.

To accomplish this, conferences between Company representatives and Commission staff members were held at intervals during 1943. Studies made and data submitted by the Company during these negotiations relating to 1942 operation, revenues and expenses indicate that in addition to the saving produced by the lowered price of gas purchased from United Gas Pipe

Line Company amounting to \$140,174, there were excess earnings of \$101,649 over a  $6\frac{1}{2}\%$  return on a rate base derived from book cost. A reduction in rates calculated to eliminate excess earnings of \$101,649 will amount of \$169,415 since the savings in Federal income taxes at current tax rate levels of 40% will amount to \$67,766.

In addition to the indicated reduction composed of these items, the discussions and analyses showed that the Southwest Gas Producing Company, Inc., an affiliate supplying a part of the Company's requirements from the Monroe field, also earned a return in excess of  $6\frac{1}{2}\%$  in 1942. When this fact was brought to the attention of that company, its voluntarily made reduction in the price of its gas amounting to \$52,812, annually, based on 1942 deliveries.

All these factors combine to indicate that a reduction of \$362,400 could be made without reducing the return below  $6\frac{1}{2}\%$  on the rate base. As a result of these studies and discussions, and based upon the foregoing considerations, the Company agreed to and later filed supplements to its rate schedules making a reduction of at least \$352,902.

Your Petitioner would further show that at the time of the rendering of Opinion #104, of the Federal Power Commission, and at the time of the conferences between the Federal Power Commission, Memphis Natural Gas Company, and the Memphis Light, Gas & Water Division, all of the parties were familiar with the order of the Federal Power Commission dated April 27, 1943, as modified June 9, 1943, which order required the Interstate Natural Gas Company to reduce its rates for gas sold to its customers and of the Court Order dated June 14, 1943 restraining the enforcement of the order of the Federal Power Commission and impounding the funds, which are now being held by this Court in this cause.

Your Petitioner further avers that the matter of the rate reduction of the Interstate Natural Gas Company was discussed thoroughly and an understanding was reached as evidenced in Federal Power Commission's Opinion #104, page 9, which opinion with respect to this particular matter is as follows:

"The Company also purchases gas from Interstate Natural Gas Company, Inc. During the course of the negotiations the Commission issued its investigation of the Interstate Natural Gas Company, Inc. (Docket No. G-149). This order is now in litigation. Representatives of the Company have stated, however, that any future benefit the Company may receive by rea-

son of the aforesaid rate-reduction order will be passed on to its customers."

Your Petitioner would show that the Memphis Natural Gas Company is now estopped to claim any interest in this fund by reason of their position and agreement before the Federal Power Commission and of the opinion of the Federal Power Commission, #104 based thereon, from which opinion the Memphis Natural Gas Company did not see fit to appeal or question, and that the rate then fixed was determined in the light of the possibility of the sustaining of the Federal Power Commission Order of April 27, 1943 as modified June 9, 1943 based upon the understanding that the Memphis Natural Gas Company would refund the money impounded by the Court in this cause to its customers should the order of the Federal Power Commission be sustained.

Your Petitioner would further show that the Memphis Natural Gas Company was present in informal conferences with the Federal Power Commission in the City of Memphis, which preceded the order issued by the Federal Power Commission fixing the present rate schedule of the Memphis Natural Gas Company from which the Memphis Light, Gas & Water Division purchased its supply of gas and at these conferences, it was understood by all parties, any further reduction in field price for gas would be passed on in toto to the customers of the Memphis Natural Gas Company.

In support of this allegation, your Petitioner exhibits affidavit of J. H. Johnson, which is marked Exhibit "D" to this Petition.

Your Petitioner further avers and show that if this Court should find that the question of who is entitled to the sum impounded amounting to \$387,347, has not been settled by Opinion #104 of the Federal Power Commission, or by previous negotiations and understanding between the parties, and that this Court has no jurisdiction to order the distribution of the funds in question, the funds should be held by this Court until the rights of persons to said fund can be adjudicated and determined by Court or Commission having jurisdiction thereof.

Petitioner further shows that under all rules of equity that they are the ultimate customer under the meaning of the Natural Gas Act, and they are entitled in the last analysis to the funds now held by this Court to the extent of \$387,347.

#### WHEREFORE, YOUR PETITIONER PRAYS

That a copy of this bill be served on the Interstate Natural Gas Company and that upon a hearing of this Petition, Petitioner be granted an order directing that Clerk of this Court pay to the Memphis Light, Gas & Water Division the sum of \$387,347, and

that it be granted such further, other and general relief as it maybe entitled to in equity or under all the facts and the law.

BOARD OF LIGHT, GAS & WATER COMMISSIONERS OF  
MEMPHIS LIGHT, GAS & WATER DIVISION

By THOS. H. ALLEN,  
*President.*

SAMUEL S. PHARR,  
*Vice-President.*

I. J. LICHTERMAN,  
*Commissioner.*

CHAS. C. CRABTREE,  
WESLEY HARVELL,

*Attorneys for Memphis Light, Gas &  
Water Division.*

48 *Duly sworn to by Thos. H. Allen jurat omitted in printing.*



## Exhibit "A"

## INTERSTATE NATURAL GAS COMPANY

To Mississippi River Fuel Company  
Sales to Other Utilities:

\$1,320,978

	Net Sales 1946	Percent	Refunds
Arkansas Power & Light Co.	1,794,402	3.363	\$ 52,350
Arkansas Louisiana Gas Co.	716,638	1.583	20,911
Missouri Natural Gas Co.	559,018	1.234	16,301
St. Louis County Gas Co.	2,892,292	6.388	84,384
Laclede Gas Light Co.	8,781,903	19.396	256,217
Illinois Power Co.	1,716,150	3.790	50,065
Union Electric Co. of Ill.	271,210	1.599	7,913

Total Sales to Other Utilities	16,731,613	36.953	488,141
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Direct Consumer Sales (Industrial)	28,546,037	63.047	832,837
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Total Gas Sales	45,277,650	100.000	\$1,320,978
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## To Southern Natural Gas Company

\$581,721

## Sales to Other Gas Utilities:

Atlanta Gas Light Co.	37,957,102	48.00	279,226
Georgia Power Co.	2,556,079	3.60	20,942
Alabama Gas Company	11,974,625	16.88	98,195
Alabama Power Co.	442,006	.62	3,607
Birmingham Gas Co.	3,679,693	5.18	30,133
Municipality of Pell City	23,042	.03	175
Mississippi Gas Company	3,595,817	5.07	29,493
Mississippi Power & Light Co.	829,822	1.17	6,806
Vicksburg Municipal Gas System	603,674	.85	4,944

Total Gas Sales to Utilities	57,561,800	84.40	473,521
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Direct Consumer Sales (Industrial)	13,196,692	18.60	108,200
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Total Sales	70,958,552	100.00	\$ 581,721
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To United Gas Pipe Line Company  
Memphis Natural Gas Company

\$563,741

## Sales to Other Utilities:

Memphis Light Gas and Water Div.	18,009,540	68.71	387,347
West Tennessee Gas Co.	1,137,407	4.34	24,466
Arkansas Power & Light Co.	273,943	1.05	5,919
Mississippi Power & Light Co.	3,835,089	14.63	82,475

Total Sales to Other Utilities	23,255,979	88.73	500,207
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## Direct Consumer Sales

(Memphis Generating Co.)	2,954,313	11.27	63,534
Miscellaneous Sales	6,327	.....	.....

Total Sales	26,216,619	100.00	563,741
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*Exhibit "B"*United States of America  
(Federal Power Commission)

Commissioners { Leland Olds, Chairman, Claude L. Draper and  
John W. Scott. Basil Manly not participating.

August 31, 1943

## In the Matter of

## MEMPHIS NATURAL GAS COMPANY

*Order Making Effective Reductions in Rates*

It appearing to the Commission that:

- (a) Following conferences with representatives of the Commission, Memphis Natural Gas Company, on August 9, 1943, filed the Supplemental Rate Schedules referred to in paragraph (A), below, by which it made certain revisions in its rates for the sale of natural gas for resale, representing an estimated reduction of approximately \$352,900;
- (b) Memphis Natural Gas Company has made application that the reduced rates be allowed to take effect for all bills rendered for natural gas deliveries on and after July 26, 1943, and it is in the public interest that such retroactive effective date be established;

Now, therefore, in view of the foregoing and for the reasons set forth in its Memorandum Opinion (Opinion No. 104);

The Commission *orders* that:

- (A) Supplement No. 3 to Memphis Natural Gas Company Rate Schedule No. 2; Supplement No. 3 to Memphis Natural Gas Company Rate Schedule No. 3; Supplement No. 2 to Memphis Natural Gas Company Rate Schedule No. 5; Supplement No. 3 to Memphis Natural Gas Company Rate Schedule No. 7; and Supplement No. 1 to Memphis Natural Gas Company Rate Schedule No. 8, be and they are hereby allowed to take effect for all bills rendered for natural gas deliveries on and after July 26, 1943;
- (B) The aforesaid Supplemental Rate Schedules shall be deemed to have been filed and published in compliance with the Natural Gas Act;

51. (C) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, by or against the Applicant.

By the Commission.

LEON M. FUQUAY,  
*Secretary.*

52

*Exhibit "C"*

United States of America  
Federal Power Commission

Opinion No. 104

In the Matter of

MEMPHIS NATURAL GAS COMPANY

*Memorandum Opinion*

**BY THE COMMISSION:**

Following conferences between representatives of the Commission and of the Memphis Natural Gas Company,<sup>1</sup> at some of which representatives of the latter's customers were present, the Company filed with the Commission on August 9, 1943, supplements to its rate schedules then on file. Such supplements will effect a saving of \$352,900 to purchasers of natural gas for resale. The Commission has accepted these supplements for filing and, by order entered August 31, 1943, made them applicable to all deliveries on or after July 26, 1943.

The basis upon which this reduction in rates was made and the manner in which it was achieved are matters of public interest. This memorandum opinion is issued for the purpose of making these matters a public record.

53

**HISTORY OF NEGOTIATIONS**

The negotiations leading to the filing of the reduced rates followed Commission dismissal of the complaint of Arkansas Department of Public Utilities (Docket No. G-262). This complaint was dismissed upon petition by that Department, following the filing of a \$5,000 annual reduction in rates to the Arkansas Power & Light Company by the Company. Representatives of the Commission and of the Company at that time agreed that in the near future, par-

<sup>1</sup> Hereinafter sometimes referred to as the "Company."

ticularly if the Company received any savings in the cost of gas purchased through Commission action, the Company would voluntarily enter into conferences with the Commission staff reviewing its entire situation with respect to earnings and rates.

The United Gas Pipe Line Company made a reduction effective April 1, 1943, in the cost of the gas sold to the Company, as a part of its settlement in an investigation of its rates (Docket No. G-148). In its Opinion No. 90, in that docket, the Commission called to the attention of companies receiving reductions in the cost of gas, the obligation to "pass on" this reduction to their customers.

To accomplish this, conferences between Company representatives and Commission staff members were held at intervals during 1943. Studies made and data submitted by the Company during these negotiations relating to 1942 operations, revenues and expenses

indicate that in addition to the saving produced by the lowered price of gas purchased from United Gas Pipe Line Company amounting to \$140,174, there were excess earnings of \$101,649 over a 6½% return on a rate base derived from book cost. A reduction in rates calculated to eliminate excess earnings of \$101,649 will amount of \$169,415 since the savings in Federal income taxes at current tax rate levels of 40% will amount to \$67,766.

In addition to the indicated reduction composed of these items, the discussions and analyses showed that the Southwest Gas Producing Company, Inc., an affiliate supplying a part of the Company's requirements from the Monroe field, also earned a return in excess of 6½% in 1942. When this fact was brought to the attention of that company, it voluntarily made a reduction in the price of its gas amounting to \$52,812, annually, based on 1942 deliveries.

All these factors combine to indicate that a reduction of \$362,400 could be made without reducing the return below 6½% on the rate base. As a result of these studies and discussions, and based upon the foregoing considerations, the Company agreed to and later filed supplements to its rate schedules making a reduction of at least \$352,902.

#### JURISDICTION

Memphis Natural Gas Company owns and operates a natural gas pipe line system of approximately 305 miles, extending from the Monroe gas field in northeastern Louisiana and thence through southeastern Arkansas, northwestern Mississippi and into and through a portion of western Tennessee. It purchases natural gas in the Monroe field from the Southwest Gas Producing Company, Inc., an affiliated producer, and from the United Gas Pipe Line Company. It transports this gas through its interstate pipe

The system and delivers gas for resale to the Louisiana Power and Light Company in Louisiana, to the Mississippi Power and Light Company in Mississippi, to the Memphis Light, Gas and Water Division of the City of Memphis in Shelby County, Tennessee, and to the West Tennessee Gas Company in other counties in western Tennessee. It also transports and delivers gas directly to the Memphis Generating Company which consumes the gas in the process of the generation of electricity. All of these deliveries and sales, with the exception of the one to the Louisiana Power and Light Company and the one to the Memphis Generating Company, represent the transportation and sale of natural gas in interstate commerce for resale within the meaning of the Natural Gas Act. The Company is, therefore, a natural-gas company as defined by the Act.

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## RATE BASE

*Book Cost of Plant*

The basis accepted by both the Company and the Commission for the determination of the rate base for these informal proceedings was the book cost of the Company's property, as of December 31, 1942. No audit was made by the Commission staff of the Company's books. The Company had contended early in the negotiations that the book cost did not fairly reflect the value of its property, since it had been constructed during a period of low prices. However, for the purpose of setting these rates the Company has agreed to a cost or investment rate base and the Commission has accepted the book cost, in the absence of an audit of original cost of the Company's properties. The amount shown on the Company's books as total cost of utility plant at December 31, 1942, was \$10,795,763.

*Accrued Depreciation*

The Company has used, principally, a 25-year life in determining its annual depreciation allowances and accrued depreciation. During the negotiations, the Company representatives suggested that such a life was somewhat shorter than those used by the Commission in other proceedings involving Companies obtaining gas from the Monroe field. It suggested that a 31-year life for transmission property would be consistent with the life used in other proceedings.

57

Instead of the annual depreciation charges and the accrued depreciation shown on the Company's books, the amounts used in the determination of the new rates were based



upon a 31-year life. On this basis the accrued depreciation as of December 31, 1942, was determined to be \$3,776,673.

### *Construction Work in Progress*

The allowance for construction work in progress is based upon the latest available data and includes additions for which material allotments have been granted by the War Production Board and orders placed. In brief, the work is:

Additions to Guthrie compressor station	\$376,468
Additions to Lula compressor station	63,223
Additions to Wilnot compressor station	1,778
Relocation of Greenwood meter station	374
Additions to dwelling houses at Brooks Avenue meter station	537
Vehicles and drag line	5,898
<b>Total</b>	<b>\$448,278</b>

Allowances originally requested by the Company for other work contemplated, but for which material has not yet been allocated, are not included.

### *Working Capital*

Working capital is computed by adding to the cost of materials and supplies on hand at December 31, 1942, the amount of \$111,500, one-eighth of the 1942 operating expenses, exclusive of the cost of gas purchased amounting to \$64,012. The determination of working capital in this manner conforms with the practice generally applied by the Commission.

### *Rate Base Summary*

The rate base for this proceeding was determined as follows:

Book cost of plant December 31, 1942	\$10,795,763
Reserve for depreciation December 31, 1942	3,776,673
Depreciated plant December 31, 1942	7,019,090
Construction work in Progress	448,278
Working Capital	175,512
<b>Rate Base</b>	<b>\$7,642,880</b>

## RATE OF RETURN

For the purpose of determining the cost of service and the proper rates to be charged for gas, at 6 $\frac{1}{2}$ % rate of return on the above rate base is found to be reasonable and is accepted by the Company. This is consistent with the Commission's findings and decisions in other cases.

## OPERATING REVENUE DEDUCTIONS

The allowances made for operating revenue deductions are based on the Company's actual experience for the year 1942 as shown in its annual report to the Commission subject, however, to adjustments necessary to eliminate abnormalities in the reported 1942 figures. In addition, Company representatives presented data and information in support of claims for increased costs not fully reflected during the year 1942. Agreement as to the appropriate allowances for operating revenue deductions was arrived at after detailed discussion of the matter at conferences attended by the staff and Company representatives. The major items of adjustment are commented upon under individual subheadings below. By the procedure followed in this matter the Company, the consumers, the Commission, and the taxpayers are saved considerable expense that would have been incurred if the matter had proceeded to formal hearings.

### *Increased Operating Expenses*

Information supplied by the Company shows that a general increase of 10% in wages, exclusive of general and administrative salaries, was granted as of June 15, 1942, and the full effect of such increase is not reflected in the 1942 income account. Furthermore, certain additional increases in operating expenses may be expected to result from (1) negotiations currently being conducted regarding further wage increases, (2) hiring additional personnel, and (3) operation of a new dehydration plant and of additional compressor station capacity. An increase of \$54,216 in operating expenses has been accepted as reasonable to provide for these items.

### *Reductions in Cost of Purchased Gas*

By this Commission's Opinion No. 90 and accompanying order (United Gas Pipeline Company, Docket No. G-448), the Company benefited by a reduction of \$140,174 in the cost of its purchased gas. A voluntary reduction in rates by the Southwest Gas Producing Company, Inc., resulted in the reduction of the cost of purchased gas by \$52,812. These amounts have been

deducted from the cost of gas purchased in 1942, in order to reflect the reduced costs in the future.

The Company also purchases gas from Interstate Natural Gas Company, Inc. During the course of the negotiations the Commission issued its Opinion No. 91 and rate-reduction order, in the matter of its investigation of the Interstate Natural Gas Company, Inc. (Docket No. G-149). This order is now in litigation. Representatives of the Company have stated, however, that any future benefit the Company may receive by reason of the aforesaid rate-reduction order will be passed on to its customers.

### *Annual Depreciation Allowance*

The annual depreciation allowance is based on the Company's estimated 31-year life and is harmonized with the accrued depreciation used in determining the rate base. For the year 1942 it is \$365,431.

### *Taxes*

In the case of taxes other than Federal income, the Company's books do not reflect a normal year's taxes, because of large adjustments relating to prior years. These prior year adjustments have been eliminated and the resulting amount of \$258,512 allowed as representing the best estimate available of the normal recurring amount of taxes other than Federal income taxes.

Concerning Federal income taxes, the Company has accepted the principle that tax-saving arising by reason of a rate reduction should be passed along as part of that reduction. Tax calculations have been made at the rate of 40%, this being the current level for normal and surtaxes. The problem of excess profits taxes is not involved since, according to the best estimates available at the time of the discussions, the Company is not liable for such taxes.

After making appropriate adjustments to income taxes for non-recurring and other abnormal items, it was estimated that \$302,771 represents the Federal income tax liability upon the adjusted 1942 earnings. The saving in Federal income tax attributable to the elimination of excess earnings of \$101,649 was calculated as \$67,766. Deducting this saving, the remainder of \$235,005 is accepted as a proper allowance for Federal income taxes.

The taxes of the Company for 1942 are reduced by reason of a refund of Louisiana gathering taxes of \$27,926 relating to prior years. It is necessary to eliminate this non-recurring item in order to determine the actual tax situation for the year 1942. Accordingly, the appropriate adjustment requires that the allowance for 1942 gathering tax expense be increased by \$27,926 over that actually recorded.

## TOTAL COST OF SERVICE

Taking into account the foregoing adjustments, the cost of service, including all operating revenue deductions and a 6½% rate of return on depreciated book cost, is \$3,799,060, determined as follows:

Operating Expenses:		
Actual in 1942	\$2,554,139	
Add: Refund of Prior Years' Taxes	27,926	
Anticipated Increase in Expenses	54,246	
Deduct: Reduction in Cost of Gas	(192,986)	\$2,443,325
Depreciation		365,431
Taxes other than Federal Income		258,512
Estimated Federal Income Taxes in 1942	302,771	
Less Saving by Rate Reduction	67,766	
		235,005
Return at 6½% on Depreciated Book Cost		49,787
Total Cost		3,799,060

## RATE REDUCTION

The revenue from gas sales in 1942 was \$4,161,461. The excess above the 1942 adjusted cost is \$362,401. The rates filed would have produced a revenue in 1942 of \$3,808,559 and would have resulted in a reduction of \$352,902. This is divided between the customers buying the gas at resale as follows:

	Amount
Memphis Light, Gas & Water Division	\$131,046
Mississippi Power & Light Company	124,990
Arkansas Power & Light Company	18,358
West Tennessee Gas Company	77,933
Louisiana Power & Light Company	575
	<hr/>
	\$352,902

Included in the reduction to the Arkansas Power & Light Company of \$18,358 is \$3,927 that the Arkansas Power & Light Company would have received in 1942 had the rates which became effective November 1, 1942, been effective the entire year. The reduction below the present rates to the Arkansas Power & Light Company is \$14,431 and the total reduction to all customers below present rates is \$348,975.

## NEW RATES

The rates as filed consist of a general rate to be applied to all gas sold, except that resold to certain large industrial consumers, and a separate rate for the latter. The general rate is on a demand

and commodity basis, whereas the rate for gas resold to certain large industrial customers is a straight commodity rate. A study indicates that the new rates will reflect revenue in amounts more closely approximating cost than could be accomplished by rates of the old form. The new rates eliminate a wide variation in the Company's present average rates. Each of the purchasers has advised the Commission that both the new rates and its participation in the total reduction as brought about by the new rates are satisfactory to it. The following tabulation shows the comparative average rates before and after the reduction, based on 1942 deliveries:

	Average Rates in 1942	Average Rates Under New Filing
Memphis Light, Gas and Water Division	16.0c per Mcf	15.1c per Mcf
Mississippi Power & Light Company	20.3c " "	15.7c " "
Arkansas Power & Light Company	28.1c " "	17.2c " "
Louisiana Power & Light Company	36.5c " "	15.2c " "
West Tennessee Gas Company	25.4c " "	15.8c " "
All resale gas	17.1c " "	15.3c " "

#### DISPOSITION OF SAVINGS WHICH RESULT FROM REDUCED RATES

Just as money impounded during a court proceeding to test the validity of a regulatory commission's order, and representing the difference between prior existing rates and the reduced rates established, belongs to ultimate consumers, so also the savings here resulting from reduced rates belong to ultimate consumers. In *Natural Gas Pipeline Company, et al. v. Federal Power Commission*, 134 F. (2d) 263, 265, the Court said:

That it (the utility serving Nebraska City) and others may know and plan accordingly, we express our conclusion, and our holding, which is *all refunds which petitioners must make, belong to the consumers*, for whose benefit these proceedings were instituted.

\* \* \*

Now one or two of these utilities located where no state supervisory commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, if they were to succeed. With their efforts in this respect, we have no sympathy.

The court will make an order on this finding that the money refunded by petitioners belongs to the consumers and none belongs to the utility or utilities.



Savings to purchasers of natural gas for resale, and which result from the application of the reduced rates here under consideration, should be distributed equitably by such purchasers to their ultimate consumers.

The supplements to Memphis Natural Gas Company's rate schedules, as filed, have by order been made effective as of July 26, 1943.

LELAND OLDS,  
*Chairman.*

CLAUDE L. DRAPER,  
*Commissioner.*

BASIL MASLY,  
*Commissioner.*

JOHN W. SCOTT,  
*Commissioner.*

Dated at Washington, D. C., this  
21st Day of September, 1943.

LEON M. FUQUAY,  
*Secretary.*

66

*Exhibit "D"*

STATE OF TENNESSEE,  
County of Shelby

I, J. Hardie Johnston, Jr., hereby make oath to the following facts: —

I was present at all conferences held between representatives of the Federal Power Commission, Memphis Natural Gas Company and its customers, relative to the establishment of new rates for the Memphis Natural Gas Company, under which gas is sold to its various customers; and that the rates established at that time have been in effect since that date and are in effect at this date.

I further state that at the direction of President of Memphis Light, Gas & Water Division, I, in conjunction with Mr. A. J. Luick, made a report relative to the rates and the conferences, and that the following is a direct quotation from this report which was made immediately after the conferences, resulting in Order dated August 31, 1943 and Federal Power Commission Opinion 104:

"Therefore, as a result of the investigations and findings of the Federal Power Commission, certain reductions are definitely assured for the price of gas in the field and further reductions are in prospect. Since however these further reduc-

tions are not definitely assured, no account of them was taken by the Federal Power Commission in determining the amount of the present reduction in rates which would apply to consumers who are buying from Memphis Natural Gas Company. It is the understanding that any reductions which result from the findings of the Federal Power Commission, assuming it to be successful in the pending litigation, are to be passed on by Memphis Natural Gas Company in total amount to its customers.

"It was further suggested by the representatives of the Federal Power Commission that, if and as further reductions are secured in the field prices for gas as a result of the litigation hereinbefore referred to, it would be the opinion of the representatives of the Federal Power Commission that much of such further reduction should apply to the lowering of the demand portion of the schedule. With this in mind, much of the objection to the two-part rate disappears and, in view of the definite desire of Federal Power Commission that this form of rate be applied by Memphis Natural Gas Company, it appeared to be desirable to accept the change in the form of rate. We might mention in passing that none of the other customers who were present at the conferences expressed any opposition to the change in the form and indicated a preference for this type of schedule to the rates which they were now being charged."

The foregoing is a true statement of the facts as they occurred.

This the 24 day of January, 1948.

J. HARDIE JOHNSTON, JR.

Sworn to and subscribed before me this 24th day of Jan., 1948.

WESLEY HARVELL,

(Seal)

Notary Public.

My commission expires:

Oct 2nd, 1949.

68 In the United States Circuit Court of Appeals

*Petition of Memphis Natural Gas Company For An Order Permitting It To Intervene and For An Order Directing the Clerk To Pay To It \$559,594.38 and An Order Directing Interstate Natural Gas Company To Pay Direct To Memphis Natural Gas Company \$32,871.44.—Filed January 26, 1948.*

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT: \*

The Memphis Natural Gas Company respectfully shows:

1. It is a Delaware corporation owning and operating a pipe line which originates in Louisiana, passes through Arkansas and Mississippi, and terminates in Tennessee. Its general offices are in Memphis, Tennessee. The natural gas owned and transported by it sold at wholesale in Louisiana, Arkansas, Mississippi and Tennessee to distributing companies. It distributes no gas, as it is engaged exclusively in the interstate transportation of natural gas for resale at wholesale to the various distributing companies which are its customers.

69 It is subject to the jurisdiction of the Federal Power Commission.

Department of Conservation v. Federal Power Commission,  
148 F. 2d 746 (5 C);

Mississippi Power & Light Co. v. Memphis Natural Gas Co.,  
162 F. 2d 388 (5 C).

2. From June 1, 1943, the effective date of the stay order, to December 10, 1945, inclusive, the United Gas Pipe Line Company purchased from Interstate Natural Gas Company, Inc. large amounts of gas for the account of the Memphis Natural Gas Company and pursuant to existing contracts which obligated Interstate to sell to United and obligated United to sell to Memphis. A part of the funds now on deposit in this Court represent money collected by Interstate from United for the account of Memphis. This is admitted in Paragraph 5 of the motion filed by Interstate for a distribution order. This is admitted also in Opinion No. 91 rendered by the Federal Power Commission on April 27, 1943, requiring Interstate to reduce its rates. The opinion states:

\*\*\* \* Interstate transports the gas which it buys from such companies in the Monroe field and commingles that gas with gas which it has produced and gathered in the Monroe field, and then transports this commingled gas to the points of sale and delivery in Louisiana to the Mississippi River Fuel

Corporation, Southern Natural Gas Company, and United Gas Pipe Line Company for the account of Memphis Natural Gas Company. The gas transported and sold by Interstate to these three pipe line Companies continues its flow in interstate commerce and, as an established course of business well known to Interstate, is destined for resale for ultimate public consumption in markets outside Louisiana. \* \* \*

The decision of this Court, *Interstate Natural Gas Company, Inc. v. Federal Power Commission*, 156 F. 2d 949, states in a footnote that the gas sold by Interstate to United is "for account Memphis Natural Gas Company."

70 That part of the impounded funds representing moneys collected by Interstate from United incident to gas sold from June 1, 1943 to December 10, 1945 by Interstate to United for the account of Memphis is \$323,948.32. Interstate, United and Memphis are in agreement that this figure is correct and Memphis is informed they recognize that it is the owner of said amount.

On April 16, 1945 Interstate and Memphis made a contract whereby the former obligated itself to sell direct to Memphis certain quantities of natural gas, with the result that subsequent to December 10, 1945 Memphis has made direct purchases from Interstate.

That part of the impounded funds representing moneys incident to sales by Interstate to Memphis subsequent to December 10, 1945 and through September, 1947 is \$235,646.06. Interstate and Memphis are in agreement that this figure is correct and Memphis is informed Interstate recognizes that Memphis is the owner of said amount.

The total part of the impounded funds due and payable Memphis incident to gas purchased by United from Interstate for the account of Memphis and incident to gas purchased direct from Interstate by Memphis is \$559,594.38.

In addition to the above amounts there is due Memphis from Interstate \$32,871.44 which has not been deposited in Court. Interstate admits this additional amount to be due Memphis.

3. Memphis has not heretofore been a party to this proceeding, but is now filing this petition to intervene because of its ownership of said part of the impounded funds.

71 On December 29, 1947 the Clerk of this Court addressed a joint letter to the United Gas Pipe Line Company, Inc., Memphis Natural Gas Company, Southern Natural Gas Company, and Mississippi River Fuel Corporation, advising that the motion filed by Interstate for an appropriate order of distribution of the impounded funds will be heard by this Court on January 28, 1948, and in substance invited the Memphis Natural

Gas Company to make known to the Court its claims. This petition to intervene is filed in response to the Clerk's letter and for the reason that Memphis has a substantial interest in the future proceedings and orders of this Court relating to the impounded funds.

4. The stay order entered by this Court on June 14, 1943 states in part that:

"The amount so deposited shall remain on deposit, subject, however, to the further order or orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act."

The order also states in part that:

"Full power and jurisdiction is reserved to cancel or modify this order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

This intervenor, the Memphis Natural Gas Company, respectfully submits that the only lawful and proper order with respect to the part of the impounded funds claimed by it is an order directing the Clerk to distribute and deliver to Memphis said part of the impounded funds. Neither the distributing companies which are customers of the Memphis Natural Gas Company nor ultimate consumers are entitled in this proceeding to an order by this Court directing that any part of the impounded funds be distributed to them. This Court has no jurisdiction or lawful power to  
72 enter any order for distribution other than an order directing the Clerk to distribute and deliver to Memphis the above described part of the impounded funds.

The record herein shows that on April 27, 1943 the Federal Power Commission entered an order, modified June 9, 1943, reducing the rates which Interstate could thereafter charge for gas sold to United for the account of the Memphis Natural Gas Company and for gas later sold by Interstate direct to Memphis. Since the entry of said orders by the Federal Power Commission, which were later affirmed by this Court and the Supreme Court of the United States, the reduced rates have been the "just and reasonable rate charge, \* \* \* to be thereafter observed and in force" etc. The Natural Gas Act, 45 U. S. C. A. 7717d. The jurisdiction of this Court is limited to "a review of such order" entered by the Federal Power Commission. The Natural Gas Act, 45 U. S. C. A. 717r. This Court has exercised its appellate jurisdiction and has affirmed



the order of the Commission reducing the rate to be charged by Interstate for natural gas sold to the several pipe lines here involved which are customers of Interstate by privity of contract. Said customer pipe line companies are the only parties in privity with Interstate, and there can be no lawful basis for an order directing a distribution of the impounded funds to either distributing companies which are customers of the pipe line companies or to ultimate consumers who are customers of the distributing companies.

The impounded funds represent moneys unlawfully collected by Interstate from Memphis and the other pipe line companies subsequent to the order of the Commission that rates be reduced by Interstate.

73 The sum of \$592,465.82 represents excessive, unlawful and illegal charges paid by United to Interstate for the account of Memphis and paid direct by Memphis to Interstate during the period stated supra. Said money would not have been paid by Memphis except for the stay order of this Court, and Memphis is entitled to receive said sum which represents unlawful overcharges paid by it.

Memphis insists that any order by this Court withholding from it any part of said \$592,465.82 is beyond the jurisdiction of this Court and will be tantamount to making new rate schedules for Memphis, as the order of the Commission directed Interstate to reduce rates to its customers, namely, the Memphis Natural Gas Company and the other pipe line customers here involved. This Court has no original rate-making jurisdiction and is without lawful authority to divert from Memphis any part of the impounded funds representing moneys paid Interstate by United for the account of Memphis or paid Interstate direct by Memphis. If any part of said amounts is diverted from Memphis Natural Gas Company, an order so directing, will result in Memphis paying for the gas in question a higher rate therefor than ordered by the Commission. "Rate-making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function." *Mississippi Power & Light Co. v. Memphis Natural Gas Company*, 162 F. 2d 388 (5 C). "Rate-making is no function of the courts and should not be attempted either directly or indirectly." *Newton v. Consolidated Gas Co.*, 258 U. S. 165.

WHEREFORE, THE MEMPHIS NATURAL GAS COMPANY PRAYS:

74 1. That it be permitted to intervene in this proceeding and participate fully and in detail in all matters relating to the motion filed by Interstate for an order for distribution of funds.

2. That the stay order entered by this Court on June 14, 1942 be modified by eliminating therefrom all recitals that anyone other than the Memphis Natural Gas Company has an interest in the part of the impounded funds described herein, and that said stay order be specifically amended by eliminating all reference to ultimate consumers or customers of the Memphis Natural Gas Company as parties having an interest in the part of the impounded funds described herein, as the same belongs solely to the Memphis Natural Gas Company, and it is entitled in this Court to an order so deciding. Central States Electric Company, City of Muscatine, 324 U. S. 138.

3. That an order be entered directing the Clerk to pay to Memphis Natural Gas Company the sum of \$559,594.38 from the impounded funds and directing Interstate Natural Gas Company, Inc. to pay direct to Memphis Natural Gas Company \$32,871.44, the additional amount due but not paid into Court.

4. That the Court grant such other and different relief in the premises as may seem just and proper.

At Memphis, Tennessee, this 23rd day of January, 1948.

Respectfully submitted,

MEMPHIS NATURAL GAS COMPANY

By: H. L. MANN,

*President.*

EDWARD P. RUSSELL,

29th Floor, Sterick Building,

Memphis, Tennessee,

ALDEN T. SHOTWELL,

Ouachita National Bank,

Monroe, Louisiana,

*Attorneys for*

*Memphis Natural Gas Company.*

CANADA, RUSSELL & TURNER,

29th Floor, Sterick Building,

Memphis, Tennessee,

*Of Counsel.*

75 *Duly sworn to by H. L. Mann jurat omitted in printing.*

76

*Affidavit of Service.*

STATE OF TENNESSEE

County of Shelby

Before me, a Notary Public in and for said State and County, personally appeared EDWARD P. RUSSELL, attorney for Memphis

Natural Gas Company, who upon being duly sworn did depose and swear that he has caused service of the foregoing petition to be made upon each of the persons whose names appear below by causing the same to be deposited properly addressed thereto with postage prepaid in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Memphis Natural Gas Company  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Bldg.  
Monroe, Louisiana

Mr. Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Mr. Charles E. McGee  
Assistant General Counsel for Federal Power Commission,  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Mr. Edward Rightor  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

Mr. Warren O. Coleman  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Mr. Francis P. Burns  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

Mr. W. C. Perrault

Attorney for Louisiana Public Service Commission  
Box 4005

State Capitol

Baton Rouge, Louisiana

Mr. Roland Kizer

Attorney for the City of Baton Rouge, Louisiana

709 Louisiana National Bank Building

Baton Rouge, Louisiana

Mr. William A. Dougherty

Attorney for Interstate Natural Gas Company, Inc. and  
Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

Mr. James Lawrence White

Attorney for Interstate Natural Gas Company, Inc. and  
Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

77 Mr. Henry P. Dart, Jr.

Attorney for Interstate Natural Gas Company, Inc.  
1008 Canal Building

New Orleans, Louisiana

Mr. Henry Grady Price

Attorney for Interstate Natural Gas Company, Inc.

1008 Canal Building

New Orleans, Louisiana

EDWARD P. RUSSELL

Subscribed and sworn to before me this 23rd day of January,  
1948.

M. K. MARCHILDON,

*Notary Public.*

(SEAL) My commission expires: June 29, 1948.

78 In the United States Circuit Court of Appeals for the  
Fifth Circuit

*Motion of Southern Natural Gas Company for Leave to Intervene.  
—Filed January 28, 1948.*

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Comes now Southern Natural Gas Company, a corporation of the State of Delaware, being the corporation of that name referred to in the petition of Interstate Natural Gas Company, Incorporated, filed herein and verified under date December 16, 1947, and moves that the Court enter an order allowing the said Southern Natural Gas Company to intervene herein and to that end to file its petition for intervention in the form hereto attached.

Respectfully submitted,

SOUTHERN NATURAL GAS COMPANY

By H. D. McHENRY,  
Vice President.

FORNEY JOHNSTON,  
First National Building,  
Birmingham 3, Alabama  
Of Counsel

TO ALL PARTIES:

Please take notice that the above and foregoing motion will be presented to the Court on the 28th day of January, 1948 in New Orleans, Louisiana at 10 o'clock A. M., or as soon thereafter as the motion may be heard.

FORNEY JOHNSTON,  
Of Counsel for Southern  
Natural Gas Company.

79 In the United States Circuit Court of Appeals for the  
Fifth Circuit.

*Claim and Petition for Intervention of Southern Natural Gas  
Company.—Filed January 28, 1948.*

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Comes now Southern Natural Gas Company, herein called "Southern", and files its petition for intervention and verified



claim against Interstate Natural Gas Company, Incorporated, Petitioner in this cause, herein called "Interstate", in the principal amount of \$688,156.71.

1. Southern, a corporation of the State of Delaware, is a natural gas company, as defined in Sec. 2 (6) of the Natural Gas Act (52 Stat. 833, 15 U. S. C. Sec. 717 et seq., its status as such having been determined by the Federal Power Commission (3 FPC 822)). Southern sells natural gas owned and transported by it to certain selected distributors which in turn distribute such gas to consumers with whom Southern has no relation of privity. Southern also sells such natural gas to certain selected industrial users, pursuant to valid private contract with each. Southern has not assumed utility status nor been held to be a public utility or common carrier under the laws of any state. Its deliveries in interstate commerce to distributors since April 27, 1943, the date of the order hereinafter mentioned, have been at rates directed or approved by the Federal Power Commission, as hereinafter stated.\* Its direct deliveries to consumers, whether interstate or intrastate, have not at any time been subject to the jurisdiction or control of that Commission and have been made under said private contracts and at rates fixed by such contracts over which no public or regulatory authority has claimed or asserted jurisdiction in so far as Southern is concerned. Southern is advised by counsel, informed and believes, and on such advice information and belief avers that no public or regulatory authority has in fact, up to this time, had jurisdiction or authority to revise such private contract rates either prospectively or retroactively or otherwise to require refunds thereof to be made by Southern to any person.

2. On April 27, 1943 the Federal Power Commission entered an Order, modified May 11, 1943 and June 9, 1943, in Dockets G-149 and 132 directing Interstate to decrease its rates and charges for sales of natural gas sold to Southern and others for resale to reflect a reduction in rates which, applied to the 1941 volume of sales, would amount to not less than \$1,100,345 annually. In its opinion No. 91 accompanying said Order, the Commission made a finding to the effect that the portion of said reduction applicable to sales by Interstate to Southern for the period computed was \$146,803.

80 3. Interstate made certain parts of said Order the subject of review proceedings before this Court in the above styled cause and before the Supreme Court of the United States, with the result that said Order has been held finally effective pursuant to mandate dated or received herein on, to-wit, October 21, 1947.

\* Or otherwise lawfully filed and effective under the Natural Gas Act.

Pending such review proceedings, Interstate continued to charge its customers, including Southern, at the rates in effect prior to the Commission's Order, although, pursuant to the Order of this Court entered June 14, 1943, Interstate has paid into the registry of this Court certain amounts constituting a part of the difference between payments made by Southern to Interstate according to the rates previously existing and the lawful rates determined by said Order of the Commission.

Southern has paid to Interstate a total amount of \$688,156.71 in respect of the period June 1, 1943 to September 30, 1947, in excess of the amount payable according to the rates determined by said order of the Federal Power Commission to be the just, reasonable and applicable rates. Southern and Interstate are in agreement as to the amount of the excess paid by Southern to Interstate over the lawful, applicable rates, viz: the sum of \$688,156.71.

4. In full compliance with the provisions of the Natural Gas Act and the Rules of Federal Power Commission thereunder, Southern has filed with that Commission its rates and charges for natural gas transported and sold by Southern in interstate commerce and subject to the jurisdiction of the Federal Power Commission. No proceedings have been instituted suspending or with reference to any such rate except a proceeding (Docket G-479) in which an Order of the Federal Power Commission was entered March 30, 1946. The Order in Docket G-479 directed Southern to file new rate schedules reducing its rates for gas sold for resale. In pursuance of said Order Southern filed and has since applied in all its sales subject to the jurisdiction of Federal Power Commission, that is, sales to distributors, the new rate schedules which became and have remained effective in accordance with the Commission's Order entered July 19, 1946.

81 Since the making of said Order as to Southern on July 19, 1946, Southern has applied and collected the rates filed and sanctioned pursuant to that Order and neither the Federal Power Commission nor any State, municipality, State Commission or gas distributing company authorized by the Natural Gas Act has instituted any proceeding either by application for rehearing or review (Section 19) or by original proceeding (Section 5) to challenge or revise the rates made effective by and pursuant to said Order of July 19, 1946.

5. Under these facts Southern, in its own right, became vested with and now is entitled to the right to final settlement with Interstate for gas purchased from Interstate for the period elapsing since said order in Dockets G-119 and 132 for a sum less by \$688,156.71, principal amount, than Southern has paid to Interstate.

6. Section 19 (c) of the Natural Gas Act conferred or recognized jurisdiction in this Court to stay enforcement of the Commission's order when Interstate instituted review proceedings in this Court, but no provision of said Natural Gas Act or general power of this Court authorized suspension or impairment of Southern's vested right to refund from Interstate, except as might result from a decree herein modifying or setting aside the Order. The Order has been affirmed in all respects.

The Order of June 14, 1943 staying enforcement on the conditions stated was entered ex parte and without notice as to Southern. Southern was not a party to the proceedings before the Commission or on review by this Court and Southern should not, as it is advised, by reason of conditions imposed upon Interstate for the stay be held to have waived or transferred its right to final settlement with Interstate on the basis averred herein, that is, by recovery from Interstate in Southern's own sole right of the sum of \$688,156.71, with interest from the dates of the respective excess payments.

7. By its petition filed herein, verified under date December 16, 1947, Interstate has requested and consented that distribution of the funds remaining deposited in the registry of this Court as a condition to obtaining stay of the Commission's Order be made to Southern and other named pipe line purchasers from Interstate. Southern is, accordingly, entitled to and is willing to accept in its own right such distribution as payment pro tanto on the amount due it from Interstate provided the amount be paid to Southern without commitment or prejudice.

8. Southern is advised that by reason of the excess amount of \$688,156.71 paid by Southern to Interstate for deliveries during the period June 1, 1943-September 30, 1947, Interstate has paid into the registry of this Court \$575,248.90, leaving an additional principal amount of \$112,907.81 neither deposited nor paid.

WHEREFORE, Southern Natural Gas Company prays

that Southern be granted leave to intervene and that this petition be received as its intervening petition for the relief herein prayed;

that Southern be adjudged entitled to recover from Interstate, for its own sole right and account, the sum of \$688,156.71, with interest, and to receive as credit pro tanto thereon the sum of \$575,248.90 or such other sum as may have been deposited by Interstate in the registry of this Court and be found preferable to excess payments by Southern; or else that said

deposited funds be ordered paid to Southern without preju-

dice to its right to recover the balance due by reason of such excess payments and interest;

that this Court grant such other relief as may be appropriate.

SOUTHERN NATURAL GAS COMPANY

By H. D. McHENRY, Vice President  
*Claimant-Intervening Petitioner.*

FORNEY JOHNSTON,  
First National Building,  
Birmingham 3, Alabama  
*Attorney for Intervening Petitioner,  
Southern Natural Gas Company.*

*Duly sworn to by H. D. McHenry jurat omitted in printing.*

83                      *Affidavit of Service.*

STATE OF ALABAMA  
Jefferson County.

Before me the undersigned authority in and for said County and State, personally appeared H. D. McHenry, who being by me first duly sworn, deposes and says that he has caused copy of the foregoing motion and petition to be served upon each of the parties and persons mentioned below by causing same to be deposited in the United States mail, duly stamped and addressed as follows:

William A. Dougherty,  
30 Rockefeller Plaza,  
New York 20, New York  
and

Henry P. Dart, Jr.,  
Henry Grady Price,  
1008 Canal Building,  
New Orleans, Louisiana.

Of Counsel for Interstate Natural Gas Company, Incorporated,  
United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Mississippi River Fuel Corporation  
407 North Eighth Street  
St. Louis 1, Missouri

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Assistant General Counsel for Federal Power Commission,  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Edward Rightor, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building,  
New Orleans 12, Louisiana

Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana.

Francis P. Burns, Esq.  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana.

84 W. C. Perrault, Esq.  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana.

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana.

H. D. McHENRY,  
*Vice President, Southern  
Natural Gas Company.*

Subscribed and sworn to before me, this 27th day of January,  
1948.

(SEAL) MARGARET SCHNELL,  
*Notary Public.*



85

In the United States Circuit Court of Appeals.

*Response of Federal Power Commission to Petitioner's Motion for  
Order for Distribution of Funds—Filed January 28, 1918.*

TO THE HONORABLE, THE JUDGES, OF THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Now comes the Respondent, Federal Power Commission, in the above-entitled cause, hereinafter sometimes referred to as the Commission, by and through its attorneys and, by way of response to Petitioner's motion for an order for distribution of funds, respectfully represents:

## I

Petitioner during all the times herein mentioned has been and is now a natural-gas company under the Natural Gas Act, engaged in, among other things, the sale of natural gas to Southern Natural Gas Company, Mississippi River Fuel Corporation and United Gas Pipe Line Company, and from December 10, 1945 to Memphis Natural Gas Company.

## II

Southern Natural Gas Company during all the times herein mentioned has been and is now a natural-gas company under the Natural Gas Act, engaged in, among other things, the sale of natural gas to industrial consumers and to the following distributing companies, to wit: Atlanta Gas Light Company and Georgia Power Company in the State of Georgia; Alabama Gas Company, Alabama Power Company, Birmingham Gas Company, and Municipality of Pell City in the State of Alabama; and Mississippi Gas Company, Mississippi Power & Light Company, and Vicksburg Municipal Gas System in the State of Mississippi.

## III

Mississippi River Fuel Corporation during all the times herein mentioned has been and is now a natural-gas company under the Natural Gas Act, engaged in, among other things, the sale of natural gas direct to industrial consumers and to the following distributing companies, to wit: Arkansas Power & Light Company and Arkansas Louisiana Gas Company in the State of Arkansas; Missouri Natural Gas Company, St. Louis County Gas Company and Laclede Gas Light Company in the State of Missouri; and Illinois Power Company and Union Electric Company of Illinois in the State of Illinois.

## IV

Memphis Natural Gas Company during all the times herein mentioned has been and is now a natural-gas company under the Natural Gas Act, engaged in, among other things, the sale of natural gas to industrial consumers and to the following distributing companies; to wit: Memphis Light Gas and Water Division and West Tennessee Gas Company in the State of Tennessee; Arkansas Power & Light Company in the State of Arkansas; and Mississippi Power & Light Company in the State of Mississippi.

## V

United Gas Pipe Line Company during all the times herein mentioned has been and is now a natural-gas company under the Natural Gas Act and was prior to and from June 15, 1943 to December 10, 1945 engaged in, among other things, the purchase of natural gas from Petitioner for resale to Memphis Natural Gas Company.

## VI

The Commission by its Opinion No. 91 and order entered April 27, 1943, as modified by orders entered May 11, 1943 and June 9, 1943, required Petitioner to file on or before June 15, 1943 new schedules of rates and charges reflecting a reduction as when applied to the volume of gas sold and transported under Federal regulation for 1941 would amount to not less than \$1,091,583 per annum, distributed as follows:

Mississippi River Fuel Corporation	\$301,329
Southern Natural Gas Company	146,803
United Gas Pipe Line Company (for a/c Memphis Natural Gas Company)	148,188
United Gas Pipe Line Company for New Orleans area—Sale and Transportation	495,263

## VII

Pursuant to the order of this Honorable Court entered on June 14, 1943 granting a stay of the Commission's order, as modified, pending review, under terms and conditions as set forth in paragraph 2 of Petitioner's motion for distribution of funds, Petitioner was required to pay into the registry of this Court the monthly difference between payments to Petitioner under existing rates and the rates required by the said order of the Commission from June 15, 1943 through September 1947. Such payments have amounted to \$3,285,097.

## VIII

On June 9, 1944, Petitioner filed with the Commission rate schedules to be effective as to all bills rendered on and after June 15, 1943 for transportation and sale of natural gas for and to United Gas Pipe Line Company insofar as said order applied to the New Orleans area in compliance with the Commission's said rate order entered April 27, 1943, as modified. United Gas Pipe Line Company likewise on June 9, 1944 filed with the Commission rate schedules which effected a passing on of the reduction received from Petitioner to the distributing companies, New Orleans Public Service, Inc. and Louisiana Power and Light Company, in the New Orleans area. The Commission by order entered on June 26, 1944 accepted for filing the said rate schedules. A copy of said order is attached hereto and marked Exhibit A. Thereafter, this Honorable Court, pursuant to a stipulation, on December 5, 1944 entered an order for distribution of \$738,851 from the said funds in the registry of the Court to the ultimate consumers of natural gas in the said New Orleans area and for refund of excess payments of \$79,805 in the said registry to Petitioner, which latter amount was related to sales and transportation to and for United Gas Pipe Line Company in the said New Orleans area.

## IX

Petitioner, under an agreement dated April 16, 1945 which became effective as its rate schedule on December 10, 1945, sold and has continued to sell natural gas to Memphis Natural Gas Company which it had theretofore sold to United Gas Pipe Line Company, and which latter company, in turn, sold to Memphis Natural Gas Company.

## X

On December 10, 1947 Petitioner filed with the Commission supplements to its effective contracts covering the sales of natural gas to Mississippi River Fuel Corporation, Southern Natural Gas Company, and Memphis Natural Gas Company.

## XI

There is now on deposit in the registry of this Court the sum of \$2,466,411 for distribution, of which \$1320,978 is applicable to excess charges to Mississippi River Fuel Corporation; \$581,721 is applicable to excess charges to Southern Natural Gas Company; and \$563,095 is applicable to excess charges to United Gas Pipe Line Company from June 15, 1943 to December 10, 1945; and \$235,

646 is applicable to excess charges to Memphis Natural Gas Company from December 10, 1945 through September 1947.

## XII

It is the position of Respondent, Federal Power Commission, (1) that the primary purpose of Congress in passing the Natural Gas Act was to protect ultimate consumers of gas from excessive prices and that the aforesaid funds paid into the registry of this Court, resulting from the reduced rates ordered by the Commission, belong to and should be distributed to the ultimate consumers of the natural gas from which said funds arose; (2) that notice of Petitioner's motion and opportunity to be heard should be given interested persons, including, among others, the state regulatory commissions and cities in which are located the ultimate consumers, and the customers served for direct consumption by the natural gas companies purchasing gas directly from Petitioner; and (3) that Petitioner should be required to pay all expenses of distribution of said funds.

Respectfully submitted:

BRADFORD ROSS,

*Counsel for Respondent  
Federal Power Commission.*

Dated at Washington, D. C.  
this 26th day of January, 1948.

Address:

Harley-Wright Building  
1800 Pennsylvania Avenue, N. W.  
Washington 25, D. C.

*Exhibit A.*

United States of America  
Federal Power Commission

Commissioners { Basil Mandy, Acting Chairman, Claude L. Draper  
and John W. Scott. Nelson Lee Smith not participating.

June 26, 1944

In the Matters of

INTERSTATE NATURAL GAS COMPANY, INC.,

Docket No. G-149

LOUISIANA PUBLIC SERVICE COMMISSION, *Complainant*,

v.

INTERSTATE NATURAL GAS COMPANY, INC., *Defendant*,

UNITED GAS PIPE LINE COMPANY.

Docket No. G-132.

*Order Allowing Rate Schedule to Take Effect.*

It appearing to the Commission that:

- (a) On April 27, 1943, the Commission, *In the Matter of Interstate Natural Gas Company, Inc.* (Interstate), Docket No. G-149, and *Louisiana Public Service Commission, Complainant, v. Interstate Natural Gas Company, Inc.*, Defendant, Docket No. G-132, adopted Opinion No. 91, together with an "Order Reducing Rates," which order was thereafter modified by orders of May 11, 1943, and June 9, 1943. By said order of April 27, 1943, as thus modified, the Commission, under the Natural Gas Act, using 1941 as a test year, required Interstate to reduce its rates by \$1,091,583 per year, including a reduction of \$495,263 in the rates charged for the transportation of natural gas for, and the sale of natural gas to, United Gas Pipe Line Company (United) for resale in the New Orleans area, to be effective on all bills rendered on or after June 15, 1943.



- (b) Thereafter, on June 14, 1943, Interstate filed a petition in the United States Circuit Court of Appeals for the Fifth Circuit for review of the Commission's order dated April 27, 1943, and for a stay of said order, as modified by the orders of May 11, 1943, and June 9, 1943. On June 14, 1943, said Court issued an order granting stay of the order of the Commission dated April 27, 1943, as modified, until the further order of said Court, upon the condition, among others, that the monthly difference between payments to Interstate under existing rates or arrangements and those required under the order of the Commission should be promptly paid into the registry of said Court, and that the amounts so deposited should remain on deposit subject to the further order or orders of said Court to be returned to such ultimate consumers of gas, or other persons to whom the Court should find the same should be returned, as contemplated by the provisions of the Natural Gas Act, and upon the further condition that full power and jurisdiction were reserved to cancel or modify its said order and to enter any other orders to protect or to promote the rights and interests of the parties to the litigation and of the ultimate consumers or other parties financially interested in the impounded funds. Said order of the Court granting stay of the Commission's order of April 27, 1943, as modified, is still in force and effect; and pursuant to the provisions of said order of the Court, Interstate has regularly made monthly deposits of funds into the registry of said Court.
- 91 (c) On June 9, 1944, Interstate and United respectively filed with the Commission rate schedules, hereinafter more specifically referred to in paragraph (d), supplementing certain of their respective rate schedules on file with the Commission and to be effective as to all bills rendered on or after June 15, 1943. Such rate schedules have been filed by Interstate to comply with the Commission's order of April 27, 1943, as modified, insofar as said order applies to the New Orleans area. Such rate schedules have been filed by United to pass on the reduction received from Interstate to the two distributing companies in the New Orleans area, New Orleans Public Service, Inc., and Louisiana Power and Light Company, in accordance with the Commission's Opinion No. 90 in connection with the investigation of the rates of United in Docket Nos. G-133, G-148, G-157 and G-193.
- (d) The rate schedules filed by Interstate are schedules of rates and charges for its transportation of natural gas for, and

sale of natural gas to, United for the New Orleans area, designated as follows:

Cancellation of Interstate Natural Gas Company, Inc.  
Rate Schedule FPC No. 15;

Interstate Natural Gas Company, Inc.  
Supplement No. 8 to Rate Schedule FPC No. 16;

Interstate Natural Gas Company, Inc.  
Supplement No. 9 to Rate Schedule FPC No. 16;

Interstate Natural Gas Company, Inc.  
Supplement No. 5 to Rate Schedule FPC No. 5;

Interstate Natural Gas Company, Inc.  
Supplement No. 4 to Rate Schedule FPC No. 7;

Interstate Natural Gas Company, Inc.  
Supplement No. 4 to Rate Schedule FPC No. 8;

Interstate Natural Gas Company, Inc.  
Supplement No. 5 to Rate Schedule FPC No. 9;

Interstate Natural Gas Company, Inc.  
Supplement No. 4 to Rate Schedule FPC No. 11;

Interstate Natural Gas Company, Inc.  
Supplement No. 4 to Rate Schedule FPC No. 17;

Interstate Natural Gas Company, Inc.  
Supplement No. 4 to Rate Schedule FPC No. 23.

The rate schedules filed by United are schedules of rates and charges for its transactions with Interstate and for its sales to New Orleans Public Service, Inc., and Louisiana Power and Light Company for the New Orleans area, designated as follows.

Cancellation of United Gas Pipe Line Company  
Rate Schedule FPC No. 16;

United Gas Pipe Line Company  
Supplement No. 6 to Rate Schedule FPC No. 17;

United Gas Pipe Line Company  
Supplement No. 7 to Rate Schedule FPC No. 18;

United Gas Pipe Line Company  
Rate Schedule FPC No. 74.

(c) The aforesaid schedules of rates and charges filed on June 9, 1944, by Interstate for the transportation of natural gas

for, and the sale of natural gas to, United for the New Orleans area, when applied to the 1941 volume of sales, result in a reduction of \$541,478 annually, and are therefore in substantial compliance with the Commission's Opinion No. 91 and order of April 27, 1943, as modified by its orders of May 11, 1943, and June 9, 1943 insofar as the orders and opinion apply to the New Orleans area.

(f) The aforesaid schedules of rates and charges filed on June 9, 1944, by United for sales to New Orleans Public Service, Inc., and Louisiana Power and Light Company (collectively referred to as the New Orleans distributing companies) for the New Orleans area, when applied to 1941 volume of sales result in a reduction of \$544,175 annually.

(g) In comparison with the test year 1941 used by the Commission and the resultant ordered reduction of \$495,263 applicable to the New Orleans area, the schedules of rates and charges submitted by Interstate and by United when applied to the 1943 volume of sales, result in a reduction of \$674,853 to the New Orleans distributing companies for gas delivered at the city-gate.

(h) United's Supplement No. 6 to Rate Schedule FPC No. 17, and Supplement No. 7 to Rate Schedule FPC No. 18, consisting of agreements between United and the New Orleans distributing companies, contain written statements from the New Orleans distributing companies that they will put into effect rates to the ultimate consumers which will reflect the reductions in the rates charged by United.

93 (i) With respect to the distribution of refunds which have accrued since issuance of the Commission's order of April 27, 1943, the Commissioner of Public Utilities of New Orleans has advised the Commission that "New Orleans Public Service Inc. has agreed to pass on and I will see that it passes on to its customers the same amount received by it as a result of the reduction in the city-gate rates and that same will be made retroactive to June 1943," and the Commission has received a similar assurance from Louisiana Power and Light Company.

The Commission finds that:

In view of the foregoing circumstances, including the fact that the ultimate consumers are to receive the full amount of the refunds which have accrued since issuance of the Commission's order of April 27, 1943, it is appropriate to take the action hereinafter provided.

The Commission *orders* that:

- (A) The rate schedules described in paragraph (d) hereof be and the same are hereby accepted for filing in compliance with the Commission's Opinion No. 91 and order of April 27, 1943, as modified by its orders of May 11, 1943, and June 9, 1943, insofar as said opinion and orders apply to the New Orleans area.
- (B) The rate schedules described in paragraph (d) hereof be and the same are hereby allowed to be effective as to all bills rendered on or after June 15, 1943.
- (C) The rate schedules described in paragraph (d) hereof shall be deemed to have been filed and published in compliance with the provisions of the Natural Gas Act, as amended.
- (D) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended.
- (E) This order is without prejudice to any findings or orders which may be made by the Commission in any proceeding now pending or hereafter instituted by or against Interstate Natural Gas Company, Inc., or United Gas Pipe Line Company.

By the Commission.

LEON M. FUQUAY,  
Secretary.

84 *Duly sworn to by Bradford Ross parat omitted in printing.*

95 *Affidavit of Service.*

DISTRICT OF COLUMBIA )  
Washington )

Before me, a notary public in and for the District of Columbia, Washington, personally appeared Bradford Ross, who upon being first duly sworn, on oath did depose and say that the duly served copies of the foregoing response upon each of the persons whose names appear below, by depositing the same in the United States Post Office at Washington, D. C., in sealed envelopes properly addressed thereto with postage prepaid, on the 26th day of January, 1948. Service has so been made upon:

William A. Dougherty, Esq.  
Counsel for Interstate Natural Gas Company, Incorporated,  
30 Rockefeller Plaza  
New York 20, New York

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Mississippi River Fuel Corporation  
407 North Eighth Street  
St. Louis 1, Missouri

Edward Richter, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Francis P. Burns, Esq.  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

96 W. C. Perrault, Esq.  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana.

BRADFORD ROSS,

Subscribed and sworn to before me this 26th day of January,  
1948.

(SEAL) BERNICE P. STONE, Notary Public in and for the District  
of Columbia, Washington.

My Commission Expires June 14, 1949.



97 In the United States Circuit Court of Appeals

*Verified Statement of United Gas Pipe Line Company.—Filed  
January 28, 1918.*

Now COMES United Gas Pipe Line Company, hereinafter called "United", and respectfully shows:

1.

That it has no interest in any funds deposited in the registry of the Court in this proceeding except for the account of Memphis Natural Gas Company.

2.

That should the final judgment of this Court direct any payments be made to United in this proceeding, the same would be for the account of Memphis Natural Gas Company, hereinafter called "Memphis", and upon receipt of such funds United would remit the same in full to Memphis.

3.

United shows that in any event, such judgment as may be entered in this proceeding and which may become the final judgment of this Court, should relieve United of any responsibility or liability of any kind or character to any parties whomsoever in connection herewith.

4.

That the correct amount of such funds as should have been deposited in the registry of this Court for United for the account of Memphis should be determined in the judgment of this Court.

WHEREFORE, United prays that this verified statement may be treated as a petition to intervene herein, and that same be allowed, and that it may be relieved from any responsibility or liability in connection with this matter in accordance with the foregoing and for all orders necessary and for full, general and equitable relief in the premises and for cost.

HUFFMAN LEWIS,

*Counsel for*

*United Gas Pipe Line Company.*

C. HUFFMAN LEWIS  
1525 Slattery Building  
Shreveport, Louisiana

Of Counsel:  
WILKINSON, LEWIS & WILKINSON  
Shreveport, Louisiana

99 *Duly sworn to by M. A. Abernathy jurat omitted in printing.*

PARISH OF CALDO )  
STATE OF LOUISIANA )

Before me, a Notary Public in and for said State and Parish, personally appeared C. HUFFMAN LEWIS, attorney for United Gas Pipe Line Company, who upon being duly sworn did depose and swear that he has caused service of the foregoing verified statement to be made upon each of the persons whose names appear below by causing a copy of same to be deposited properly addressed thereto with postage prepaid in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

Memphis Natural Gas Company  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Bldg.  
Monroe, Louisiana

Mr. Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Mr. Charles E. McGee  
Assistant General Counsel for Federal Power Commission,  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Mr. Edward Rightor  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

Mr. Warren O. Coleman  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Mr. Francis P. Burns  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

Mr. W. C. Perrault

Attorney for Louisiana Public Service Commission

Box 4005

State Capitol

Baton Rouge, Louisiana

Mr. Roland Kizer

Attorney for the City of Baton Rouge, Louisiana

709 Louisiana National Bank Building

Baton Rouge, Louisiana

Mr. William A. Dougherty

Attorney for Interstate Natural Gas Company, Inc. and

Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

Mr. James Lawrence White

Attorney for Interstate Natural Gas Company, Inc. and

Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

101 Mr. Henry P. Dart, Jr.

Attorney for Interstate Natural Gas Company, Inc.

1008 Canal Building

New Orleans, Louisiana

Mr. Henry Grady Price

Attorney for Interstate Natural Gas Company, Inc.

1008 Canal Building

New Orleans, Louisiana

C. HUFFMAN LEWIS

SUBSCRIBED AND SWORN To before me this 26th day of January,  
1948.

EDITH L. EMMER

Notary Public

(Seal)

102 In United States Circuit Court of Appeals

*Order Allowing Filing of Petitions of Intervention—  
January 28th, 1948.*

IT IS ORDERED by the Court that all parties desiring to file petitions of Intervention in connection with the Motion for the Distribution of funds on deposit in the Registry of this Court in the above entitled and numbered cause be, and they are hereby, granted leave to file such Petitions of Intervention.

103

In the  
United States Circuit Court of Appeals

*Petition of Intervention by Illinois Commerce Commission—  
Filed Feb. 6, 1948*

Now comes the Illinois Commerce Commission, an administrative agency of the State of Illinois, charged by the laws of that State with the duties, among others, of general regulation of public utilities, including those furnishing natural gas therein, and, pursuant to the order or rule of the Court, made and announced at the hearing in this case held in New Orleans on January 28, 1948, permitting such intervention, files this its Petition of Intervention in this proceeding.

Your Intervenor, hereinafter for convenience referred to as the Illinois Commission, respectfully represents that its interest in this proceeding arises from the fact that a portion of the funds now in the custody of the Court was contributed originally by consumers of gas public utility service in the State of Illinois and paid, in the form of rates for such service, to two local Illinois public utility companies, namely, Illinois Power Company and Union Electric Power Company, of Illinois; that natural gas so consumed and paid for by said Illinois consumers was gas furnished by the Interstate Natural Gas Company, Incorporated, petitioner herein; that the said gas was furnished through the facilities of the Mississippi River Fuel Corporation, which last mentioned Corporation acted as an intermediary in purchasing said gas from petitioner and re-selling it to the aforesaid two Illinois public utility companies.

The Illinois Commission will contend (as so it understands, con- actions were in the nature of the furnishing of a public utility service, as distinct from the private purchase and sale of gas, and that all were made under the lawful regulation of either the Federal Power Commission or the Illinois Commerce Commission.

The Illinois Commission further states that said funds now in the custody of the court were accumulated in aid of the exercise by the Federal Power Commission of its powers, granted under the Natural Gas Act, to regulate rates of natural gas companies (as defined in said Act) and that such powers were granted by Congress, and could only have been granted constitutionally for the protection of the public.

The Illinois Commission will contend (as so it understands, contends also the Federal Power Commission, the Public Service Commission of Missouri and other public authorities here involved), that the said funds in the custody of the court should be distributed to the consumers of gas, from whom such funds

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were ultimately collected, and should not be paid to the immediate takers of gas from the petitioner, who acted but as intermediaries in the entire transaction of furnishing natural gas to the public.

To do otherwise, the Illinois Commission will contend, would be neither equitable, nor in keeping with the intent, purpose and spirit of the Natural Gas Act, nor with precedent, but would, on the contrary, divert the effect of the regulatory acts of the Federal Power Commission from the protection of the public interest to the unjust enrichment of those who stand as intermediaries between the Interstate Natural Gas Corporation, Incorporated, supplier, and the general public, ultimate users, of the aforesaid gas.

The Illinois Commission further states that the general public to whom said gas is supplied in this state includes numerous householders, small users, and others who, in the nature of things, cannot reasonably be represented in this cause by private counsel, and that, because of the public utility nature of the service involved, this Commission has a proper interest in this cause.

The Illinois Commission shows that it has served this petition of intervention upon all parties known by it to be affected thereby, as shown by the certificate of service attached hereto.

#### WHEREFORE THE ILLINOIS COMMISSION PRAYS:

That this petition of intervention be filed, pursuant to the aforesaid order of the court announced on January 28, 1948, and  
406 that the Illinois Commerce Commission become an intervenor in this cause.

That it be adjudged that the funds in the custody of the Court belong to and should be distributed equitably among the ultimate consumers of the gas with respect to which the said funds were accumulated.

That the court enter upon further hearings with respect to a plan or plans to accomplish such equitable distribution, and, with respect to such plan for distribution in the State of Illinois, the Illinois Commission states that its technical staff has had experience in developing such plans for distribution of other impounded funds of similar nature, including those relating to the Natural Gas Pipe Line Company of America, the Colorado Interstate Gas Company and the Panhandle Eastern Pipe Line Company, and respectfully offers to the Court such technical assistance of its staff as the Court may see fit to accept.

That the Court grant such further, other and general relief as may appear appropriate in equity or under all the facts and the law.

ILLINOIS COMMERCE COMMISSION

By JOHN D. BIGGS,  
Chairman.



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*Duly sworn to by John D. Biggs  
jurat omitted in printing.*

108

*Certificate of Service.*

I HEREBY CERTIFY that I have this day served a copy of the attached "Petition of Intervention by Illinois Commerce Commission" on the following named parties of record in this proceeding, by mailing a copy thereof, postage prepaid to the addresses shown on the list below.

February 3, 1948.

By NORMAN J. SCHÜTZ,

*For the Illinois Commerce Commission.*

Federal Power Commission  
Bradford Ross, General Counsel  
1800 Penn. Ave.  
Washington 25, D. C.

Public Service Commission of Missouri  
Hon. Archie McDuffie, Secretary  
Jackson, Miss.

Public Service Commission of Missouri  
Hon. Fred H. Carr  
Jefferson City, Mo.

Public Service Commission of Louisiana  
Hon. P. K. Frye, Secretary  
Baton Rouge, La.

Public Service Commission of Arkansas  
Hon. M. H. Mehaffy, Secretary  
Little Rock, Ark.

Henry P. Dart, Jr.  
1008 Canal Bldg.  
New Orleans 12, La.

Alden T. Shotwell  
Ouachita Nat'l Bk. Bldg.  
Monroe, La.

William A. Dougherty  
30 Rockefeller Plaza  
New York, N. Y.

109

Roland C. Kizer  
709-10 La. Nat'l Bk. Bldg.  
Baton Rouge, La.

Chas. C. Crabtree  
507 V & P Bldg.  
Memphis, Tenn.

C. Huffman Lewis  
1525 Slattery Bldg.  
Shreveport, La.

Forney Johnston  
First National Bk. Bldg.  
Birmingham, Ala.

Memphis Natural Gas Company  
Sterick Bldg.  
Memphis, Tenn.

Missouri River Fuel Corp.  
William G. Marbury, Vice President  
407 North 8th St.  
St. Louis 1, Mo.

W. C. Perrault, Esq.  
First Ass't. Atty. General of Louisiana  
4005 State Capitol Bldg  
Baton Rouge, La.

Illinois Power Company  
Allen VanWyck, President  
Decatur, Ill.

Union Electric Power Company  
H. C. Scott, Manager  
E. St. Louis, Ill.

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In the  
United States Circuit Court of Appeals

*Intervening Petition and Claim of Mississippi River Fuel Corporation—Filed Feb. 9, 1948*

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW Mississippi River Fuel Corporation, a Delaware corporation and a natural-gas company under the Federal Natural Gas Act (15 U. S. C. 717 et seq.), herein called "Mississippi Corporation," and, pursuant to the order of this court entered on January 28, 1948, permitting interested parties to intervene in this proceeding, files this intervening petition and claim against

Interstate Natural Gas Company, Incorporated, herein called "Interstate," petitioner in this cause, in the amount of \$1,484,582.53 representing excess charges for natural gas purchased from Interstate by Mississippi Corporation as hereinafter set forth.

1. On April 27, 1943, the Federal Power Commission entered an order providing for a reduction in rates, inter alia, to Mississippi Corporation, modified by orders entered by said Commission on May 11, 1943, and June 9, 1943, in causes G-132 and G-149 wherein the Commission found that the prices being paid for natural gas sold, inter alia, to Mississippi Corporation, were unjust and unreasonable and after supplemental order Interstate was ordered to file new schedules effective June 15, 1943.

111 2. Pursuant to an order entered by your Honorable Court on June 14, 1943, a Stay of said Federal Power Commission order was granted upon the conditions set forth therein and as recited in Interstate's "MOTION FOR AN ORDER FOR DISTRIBUTION OF FUNDS" filed with your Honorable Court, December 22, 1947. Under the protection of said stay order Interstate continued to collect from Mississippi Corporation for natural gas delivered to it the rates provided for in the contract entered into between Interstate and Mississippi Corporation under date of August 1, 1929, filed as a rate schedule with the Federal Power Commission as F. P. C. No. 4, as modified by certain schedules filed as supplements thereto. Said stay order was entered without notice to Mississippi Corporation and without any opportunity for Mississippi Corporation to participate in the determination of the terms and provisions of said stay order.

3. The subsequent appeal and disposition of the rate order by your Honorable Court and by the Supreme Court of the United States resulted in an affirmance of the said order of the Federal Power Commission and the vesting in Mississippi Corporation of its claim to the amounts of money paid into the registry of the court on account of the excess over the Federal Power Commission fixed rate collected from it.

4. During the pendency of the court proceedings to review the rate reduction order of the Federal Power Commission, Mississippi Corporation paid to Interstate in excess of the rates fixed by said Commission for gas delivered to Mississippi Corporation for the period ending with September 1947, the amount of \$1,484,582.53 which is computed on the basis of the rate schedule (Supplement No. 8 to F. P. C. No. 4) recently filed by Interstate. The reduced rate stated therein has been paid to Interstate for all gas delivered during October 1947 and subsequent months. Mississippi Corporation hereby makes claim to the amount of \$1,484,582.53, which amount is agreed to between Interstate and Mississippi Corporation. Interstate has advised Mississippi Corporation

that there has been deposited in the registry of this court on account of gas delivered to Mississippi Corporation only the sum of \$1,509,729.72 and there is owing to Mississippi Corporation the amount of \$174,852.81 in addition to the funds impounded in its account.

5. By order of the Federal Power Commission entered April 6, 1943, in Docket No. G-462, a rate investigation was instituted against Mississippi Corporation for the purpose of determining the reasonableness of rates and charges subject to the jurisdiction of the Commission. The Commission entered a rate reduction order in said proceeding on November 9, 1945, as supplemented November 30, 1945 (F. P. C. Opinion No. 126, 4 F. P. C. 340), fixing and determining the rates subject to the jurisdiction of the Commission thereafter to be charged by Mississippi Corporation. A copy of the order reducing rates is attached hereto as "Exhibit A."

6. Thereafter, Mississippi Corporation filed a review proceeding to said order in the Court of Appeals for the District of Columbia, which Court on May 28, 1947, rendered its opinion reversing in part the order of the Commission and remanding the case for further proceedings. Application for rehearing was filed by the Federal Power Commission and denied by order entered July 28, 1947 (Mississippi River Fuel Corporation v. Federal Power Commission, 163 F.2d 433). No petition for certiorari was filed by the Federal Power Commission to the judgment of reversal, and the matter is now pending before the Federal Power Commission for the entry of further orders therein.

7. In the Commission's order of November 9, 1945, paragraph E, Mississippi Corporation was directed to pass on the proper portion of the reduction made in the rates of Interstate when said Interstate reduction was finally validated by the courts. Mississippi Corporation urged the invalidity of that portion of the order, as well as other portions thereof, and the Court's Opinion commented upon that contention as follows:

113 "Petitioner urges the invalidity of that part of the order of the Commission which directs it to make effective in total amount whatever reduction of its costs of gas purchased from The Interstate Natural Gas Company is finally approved by the courts upon review of the Commission's order in that case. We need not pass upon that point, as the Supreme Court has granted certiorari and heard argument in the *Interstate* case, and the rates of that company will shortly be fixed. Since the present case is remanded, that reduction, if any be proper, can be effectuated in such manner and amount as proves proper upon the reconsideration."

8. From the foregoing it is clear that consideration of the rates which Mississippi Corporation may charge distributing company

customers for gas sold to them for resale is now pending before the Federal Power Commission, which has jurisdiction over Mississippi Corporation and is the only authority under the Natural Gas Act having initial rate-fixing power over such sales by Mississippi Corporation. Accordingly, the rates of Mississippi Corporation are already involved in the proceeding referred to, have not finally been determined, and this court has no jurisdiction to enter any order affecting such rates. The Commission has no reparation powers (*Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618); nor has this court, but to order payment of Mississippi Corporation's share to any others would be tantamount to a reparations award.

9. Moreover, in the Opinion accompanying the above Commission order, the Commission recognized a right in Mississippi Corporation to the Interstate difference in rates when it stated:

"The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by \$301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a 'commodity' charge, and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volumes of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision." (F. P. C. Opinion No. 126, *In re: Mississippi River Fuel Corporation, et al.*, Docket G-462, 4 E. P. C. 340 at 359.)

114- 10. In addition to sales made to utility distributing companies for resale which are subject to the jurisdiction of the Federal Power Commission, Mississippi Corporation makes sales of natural gas direct to industrial customers for consumption by the purchaser. These sales are made under contracts privately negotiated for specific periods of time and are excluded from the jurisdiction of the Federal Power Commission. There has been instituted by the Public Service Commission of Missouri proceedings to determine if such sales made by Mississippi Corporation in Missouri are subject to State regulation (In the Matter of Jurisdiction to Regulate Direct Sales of Natural Gas for Industrial Purposes by Mississippi River Fuel Corporation, No. 11255). Mississippi Cor-



poration is contesting the authority of said State Commission under the laws of Missouri, over such industrial sales. Under date of January 21, 1948, the Illinois Commerce Commission notified Mississippi Corporation that it should proceed without delay to take appropriate steps to comply with the requirements of the Illinois statutes regulating public utilities. Mississippi Corporation has advised the Illinois Commerce Commission that it believes it is not within the definition of a public utility under the Illinois statutes. By reason of a recent decision of the Supreme Court of the United States (Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, et al., No. 69 October Term 1947, 16 U. S. Law Week 4051), such sales of natural gas to industrial consumers, even though made in interstate commerce, are held not to be free from State regulation by reason of any provision of the Federal Constitution. Mississippi Corporation at no time has conducted its business as a public utility and has maintained at all times that such sales are free from regulatory control of any governmental authority. The prices charged for such sales, in any event, are not within the jurisdiction of this court.

WHEREFORE Mississippi Corporation prays that it be permitted to intervene as above set forth, and, further, claims of Interstate, and to the extent to which payment was made into the registry of your Honorable Court of said following amount, the sum of \$1,484,582.53 by reason of the terms of the reduced rates ordered by the Federal Power Commission in its orders above recited and prays hereby for an order from your court for immediate payment of said claimant of the sum of \$1,309,729.72, already paid into the registry of the court plus an order upon Interstate Natural Gas Company, petitioner above named, requiring it to pay to claimant an additional amount of \$174,852.81 in lieu of deposit into the registry of this court.

Respectfully submitted,

MISSISSIPPI RIVER FUEL CORPORATION.

By /s/ WILLIAM G. MARBURY,  
Vice President.

WILLIAM A. DOUGHERTY,  
(s) JAMES LAWRENCE WHITE,  
JAMES L. WHITE,

30 Rockefeller Plaza  
New York 20, New York

Attorneys for Mississippi River Fuel Corporation.

United States of America.  
Federal Power Commission

Before Leland Olds, Acting Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly, Commissioners.

In the Matter of

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.  
DOCKET NO. G-462

November 9, 1945

*Order Reducing Rates*

Upon consideration of the orders previously entered in these proceedings, the evidence of record, the briefs and oral arguments, and the Commission having on this date issued its Opinion No. 126, which is incorporated by reference and made a part of this order; The Commission *finds* that:

(1) Mississippi River Fuel Corporation is a corporation organized and existing under the laws of the State of Delaware;

(2) Mississippi owns and operates an integrated natural gas pipeline system extending from Perryville, Louisiana, through the States of Arkansas and Missouri to Alton, Illinois;

(3) Mississippi purchases natural gas in Louisiana and transports it by means of its pipeline to points in Arkansas, Missouri, and Illinois at which it sells that natural gas to industrial ultimate consumers and to seven gas companies for resale for ultimate public consumption outside Louisiana;

(4) The transportation and sale by Mississippi of natural gas to Arkansas Louisiana Gas Company, Arkansas Power & Light Company, Missouri Natural Gas Company,aclede Gas Light  
118 Company, St. Louis County Gas Company, Union Electric Company of Illinois and Illinois Iowa Power Company constitute, in each instance, the transportation and sale of natural gas in interstate commerce for resale within the purview of the Natural Gas Act, and the rates charged by Mississippi for such natural gas are subject to the jurisdiction of the Federal Power Commission;

(5) The operations and actual costs, as adjusted, for the year 1943 provide the best basis for comparing the revenues and expenses related to the volume of gas sales and investment in plant capacity for the purpose of determining the reasonable earnings and rates for the future;

(6) The actual legitimate cost of Mississippi's gas plant which is used and useful in rendering gas service, was \$23,246,126 as of December 31, 1943:

(7) The depreciation accrued in this gas plant was \$9,812,661 as of December 31, 1943, and that amount will be deducted from the actual legitimate cost in arriving at the rate base:

(8) Contributions in aid of construction were \$150,846 and do not represent investment by Mississippi, so that amount will be deducted in ascertaining the rate base:

(9) The reasonable allowance for working capital to be included in the rate base is \$430,000.

(10) The rate base, as of December 31, 1943, totals \$13,712,619, composed as follows:

Actual Legitimate Cost of Gas Plant.....	\$23,246,126
Deduct:	
Accrued Depreciation .....	9,812,661
Contributions in Aid of Construction.....	150,846
Net Investment.....	\$33,282,619
Add:	
Working Capital .....	430,000
	<u>\$13,712,619</u>

(11) In 1943 Mississippi's gas sales to utilities were 13,695,401 Mcf and to industrial customers were 29,339,973 Mcf; and related revenues were \$3,497,918 from utilities and \$5,745,218 from industrials aggregating \$9,243,136.

(12) The proper 1943 operating expenses for rate-making, before allocation are:

Gas Purchased .....	\$3,220,024
Operation, Maintenance and General Expenses .....	1,633,982
Depreciation .....	803,200
Taxes Other Than Federal Income.....	317,469
Federal Income Tax.....	334,309
Total.....	<u>\$6,308,975</u>

(13) Six percent is a fair rate of return for Mississippi:

(14) It is necessary to allocate the cost of service, including return of \$822,757, to the various classes of customers in order to segregate Mississippi's regulated and unregulated business:

(15) Recognizing both "commodity" and "demand" elements, the cost of service, aggregating \$7,131,732, should be allocated

\$4,579,427 to the unregulated business and \$2,552,305 to regulated business;

(16) Mississippi's revenues from sales to utilities for resale during the test year (1943) exceeded the cost of rendering that service, including return, by \$945,613; and the rates charged and received by Mississippi for the transportation and sale of natural gas in interstate commerce for resale are unjust and unreasonable to that extent with relation to the volumes of gas sold for resale in 1943;

(17) For the future, uniform demand and commodity rates for firm regulated sales are appropriate in this case; a commodity rate of 13¢ per Mcf of firm gas sales to the utility customers for resale is reasonable; \$764,269 is a reasonable amount for Mississippi to collect from firm utility customers in the form of a demand charge based upon the billing demand data for the year 1943; and 14¢ per Mcf for interruptible gas sales to utilities for resale is a reasonable rate;

(18) The rates and charges found to be reasonable in paragraph (17) will compensate Mississippi, through revenues from the regulated sales, in an amount sufficient to cover all operating expenses and a fair return on the rate base associated with such business.

120 Therefore, the Commission orders that:

(A) The rates charged and received for the transportation and sale of natural gas by Mississippi River Fuel Corporation in interstate commerce to the utility customers for resale for ultimate public consumption will be decreased to reflect a reduction, on an annual basis, of not less than \$945,613 in the operating revenues of the company with relation to the volume of gas sold for resale in 1943;

(B) Mississippi shall file, within thirty (30) days of the date of this order, new schedules of rates and charges for the transportation and sale of natural gas in interstate commerce to its customer companies for resale, which shall reflect not less than the reduction ordered in paragraph (A), and shall be in accord with the provisions in paragraph (17);

(C) The new schedules of rates and charges ordered in paragraph (B) when submitted in the form satisfactory to the Commission shall become effective as to all bills based on meter readings made after sixty-five (65) days from the date of this order;

(D) The unit of measurement for natural gas sold under the new rates in interstate commerce to utilities for resale shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit, and at a base pressure of eight (8) ounce gauge pressure above fourteen and four-tenths (14.4) pounds absolute atmospheric pressure, and the readings and registration of the metering equipment shall be computed into such units; and

regardless of delivery points the absolute atmospheric pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch;

(E) When this Commission's order of April 27, 1943 (FPC Docket Nos. G-149 and G-132) directing Interstate Natural Gas Company to reduce rates \$301,329 to Mississippi is validated by the courts, Mississippi shall pass on the proper portion of that reduction by reducing its rates to the utility customers by the proportion of the volumes of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision.

221 (F) Commencing with the year 1946, Mississippi shall submit reports promptly, as of June 30 and December 31 of each year until further notice, showing volume of gas sales by customers and classes and the related revenues; the revenues from gas sales to utilities for resale shall be tabulated by the old rates and the prescribed new rates.

By the Commission.

LEON M. FUQUAY,  
*Secretary.*

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*Affidavit of Service*

STATE OF NEW YORK,  
County of New York, ss:

Before me, a Notary Public in and for said County and State, personally appeared JAMES LAWRENCE WHITE, the subscriber, who upon being duly sworn did depose and swear that he has caused service of the foregoing copies of "INTERVENING PETITION AND CLAIM OF MISSISSIPPI RIVER FUEL CORPORATION" to be made upon each of the persons whose names appear below by causing the same to be deposited properly addressed thereto with postage prepaid in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Memphis Natural Gas Company  
Memphis, Tennessee

C. C. Crabtree, Esq.  
and

Wesley Harvell, Esq., Attorneys  
Memphis Light, Gas & Water Division of the City of Memphis



Union Planters National Bank Building  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Building  
Monroe, Louisiana

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Assistant General Counsel for Federal Power Commission,  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Edward Rightor, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 42, Louisiana

123 Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Francis P. Burns, Esq.  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

W. C. Perrault, Esq.  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana

Illinois Commerce Commission  
Springfield, Illinois—Attention: Mr. Warren Henry

John Randolph, Esq.  
 General Counsel for Missouri Public Service Commission  
 Jefferson City, Missouri

Original Signed

JAMES LAWRENCE WHITE.

Subscribed and sworn to before me this  
 6th day of February, 1948.

S. ANTHONY W. NEWMAN,  
*Notary Public.*

(Seal)

124 In the United States Circuit Court of Appeals

*Petition of Intervention of City of Jackson—Filed  
 February 16, 1948.*

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT  
 OF APPEALS FOR THE FIFTH CIRCUIT:

The City of Jackson most respectfully would show unto this  
 Court:

1. That the City of Jackson, Tennessee, is a municipal corporation and political sub-division of the State of Tennessee and submits this petition to intervene on behalf of itself, its approximately 5,420 citizens who are consumer customers of the West Tennessee Gas Company, and all other persons similarly situated, being the consumers of Brownsville, Humboldt, Ripley, Henning and Covington, Tennessee, all of whom are served by the West Tennessee Gas Company, a retail distributor of natural gas. Said petition is submitted under authority of an order of this Court entered January 28, 1948, and such other order as this Court may grant allowing this intervention.

125 2. That West Tennessee Gas Company purchases its gas supply for the above consumers from the Memphis Natural Gas Company, a petitioner in this cause; that said West Tennessee Gas Company disclaims any interest whatsoever to the impounded funds now held in this Court and has assigned whatever interest it may have had, or might have, to its consumers. Said disclaimer and assignment is attached hereto as Exhibit A.

3. Petitioner respectfully submits that the petition of the Memphis Natural Gas Company, hereinafter referred to as Memphis, should be denied in its entirety for the reason that all impounded funds are properly due to the ultimate consumer for whose benefit the original rate reduction was ordered.

*Panhandle Eastern Pipeline Company v. Federal Power Commission* (1946) 154 Federal (2) 909.

The delay occasioned by the appeal from the Federal Power Commission order of June 14, 1943, necessarily prevented further proper adjustment of rates through all levels, whether interstate or intra-state, to the consumer and such overcharge was thereby passed along to the ultimate consumer and is, therefore, in trust for the benefit of such consumer. To hold otherwise would be to allow Memphis to become the beneficiary of a "windfall" such as was deplored by the Court in *Natural Gas Pipeline Company of America v. Federal Power Commission*, 134 Federal (2) 263-5.

That rate making is based in the main on cost and fair return is not questioned, (*Panhandle Eastern Pipeline Company v. Federal Power Commission*, 324 U. S. 635), and when any unexpected benefit is obtained over and above fair return, it is for the benefit of the consumer and not of an intermediate utility.

*Mississippi River Fuel Company v. Federal Power Commission*, 121 Federal (2) 159.

The primary purpose of the Natural Gas Act USCA Section 717 (a-u) is to protect the ultimate consumer against overcharges and such "exploitation" as is now being attempted.

*Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591.

4. Petitioner avers that this Court has authority to order a refund of all sums due to the consumers of the cities heretofore set out, all of whom now stand in the position of the West Tennessee Gas Company. Petitioner avers that no intra-state rate changes would be involved thereby inasmuch as it is agreed by West Tennessee Gas Company that said consumers are entitled to the refund. Further, in order to make such distribution, the Court has full authority to order Memphis to disclose from its records full information as to the amount of funds impounded in this Court, justly due said consumers, and to appoint a Master to supervise said distribution.

*Central States Electric Company v. City of Muscatine*, 324 U. S. 138.

5. Petitioner submits that in the event such order as outlined in Paragraph 4 above be not granted, this Honorable Court would have authority under the holding of *Central States Electric Company v. City of Muscatine*, supra, to retain said funds in this Court pending the decision upon application and hearing to be instituted by petitioner before the Federal Power Commission to obtain a refund of such impounded funds for its consumers and a lowering of rates charged by Memphis, which proceeding petitioner pledges to institute within sixty (60) days from date of such order.

## WHEREFORE PREMISES CONSIDERED, PETITIONER PRAYS:

1. That an order be granted allowing petitioner to intervene as stated and participate fully and in detail in the distribution of impounded funds.

2. That an order be granted (1) denying the petition of the Memphis Natural Gas Company, and (2) directing the Clerk to distribute to the ultimate consumers of Jackson, Brownsville, Humboldt, Ripley, Henning and Covington, Tennessee, all impounded funds derived from gas consumed in such localities, and ordering further, (3) that Memphis disclose from its records the exact amounts due the consumers as a whole in each of said localities.

3. That a Master be appointed to distribute said funds.

4. In the alternative, if the prayer of Paragraph 2, Section 2, be disallowed, that all of said funds claimed by Memphis be retained in this Court pending the outcome of an application, and hearing thereon, before the Federal Power Commission to be instituted by the petitioner within sixty (60) days seeking an order of such Commission refunding impounded funds to said consumers and a lowering of the rates charged by Memphis.

128 5. That the Court grant such other and different relief in the premises as may seem just and proper.

At Jackson, Tennessee, this 13th day of February, 1948.

Respectfully submitted,

THE CITY OF JACKSON.

By (Signed) GEORGE SMITH,

Mayor.

RUSSELL RICE

201 Bond Building

Jackson, Tennessee

Attorney for the City of Jackson

129 *Duly sworn to by George Smith.  
jurat omitted in printing.*

130 *Affidavit of Service.*

STATE OF TENNESSEE

COUNTY OF MADISON

Before me, a Notary Public in and for the said State and County, personally appeared Russell Rice, Attorney for The City of Jackson, who, upon being duly sworn, did depose and swear that he has caused service of the foregoing petition to be made upon each of the persons whose names appear below by causing the same to be deposited, properly addressed thereto with postage

prepaid, in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Memphis Natural Gas Company  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Bldg.  
Monroe, Louisiana.

Mr. Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Mr. Charles E. McGee  
Assistant General Counsel for Federal Power Commission.  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Mr. Edward Rightor  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

Mr. Warren O. Coleman  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Mr. Francis P. Burns  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

Mr. W. C. Perrault  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana



Mr. Roland Kizer

Attorney for the City of Baton Rouge, Louisiana

709 Louisiana National Bank Building

Baton Rouge, Louisiana

Mr. William A. Dougherty

Attorney for Interstate Natural Gas Company, Inc., and

Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

131 Mr. James Lawrence White

Attorney for Interstate Natural Gas Company, Inc., and

Mississippi River Fuel Corporation

30 Rockefeller Plaza

New York 20, New York

Mr. Henry P. Dart, Jr.

Attorney for Interstate Natural Gas Company, Inc.

1008 Canal Building

New Orleans, Louisiana

Mr. Henry Grady Price

Attorney for Interstate Natural Gas Company, Inc.

1008 Canal Building

New Orleans, Louisiana

Canada, Russell and Turner

Attorneys for Memphis Natural Gas Company

Sterick Building

Memphis, Tennessee.

(Signed) RUSSELL RICE.

Subscribed and sworn to before me this the 14th day of February, 1948.

(Seal)

(Signed) VESTER G. BRADY.

Notary Public.

My commission expires January 13, 1951.

*Exhibit A**In the United States Circuit Court of Appeals  
For the Fifth Circuit*

Interstate Natural Gas Company v. Federal Power Commission et al.

No. 10701

*Affidavit of The West Tennessee Gas Company Disclaiming  
Interest in Funds Impounded in This Cause*TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT:

The West Tennessee Gas Company, a corporation doing business within the State of Tennessee respectfully would show into this Honorable Court:

1. That it is engaged in the business of distributing natural gas for retail use in the following cities of Tennessee:

City	Consumer customers as of December 31, 1947
Jackson .....	5,420.
Brownsville .....	809
Humboldt .....	929
Ripley .....	705
Henning .....	142
Covington .....	884

That as such retailer it is subject to the control of the Railroad and Public Utilities Commission of the State of Tennessee.

2. That all gas distributed in the above cities by this petitioner is obtained from the Memphis Natural Gas Company pursuant to contract arrangements between petitioner and Memphis.

3. That this petition and affidavit is being prepared expressly for the purpose of being filed as an Exhibit to the Petition of The City of Jackson in the above styled cause.

133 4. For the purpose of disclaiming any and all interest to the funds impounded in this Court the West Tennessee Gas Company submits the following affidavit:

STATE OF TENNESSEE,

County of Madison, ss:

I, John Wisdom, being duly sworn, make oath that I am the duly elected and acting President of the West Tennessee Gas Company and that I am advised that certain funds have been im-

pounded in the United States Circuit Court of Appeals for the Fifth Circuit, arising from overcharges made by the Interstate Natural Gas Company.

The West Tennessee Gas Company hereby disclaims any and all interest in such funds and assigns whatever right they may have to their consumer customers of Jackson, Brownsville, Humboldt, Ripley, Henning and Covington, Tennessee.

In witness whereof I have hereunto set my hand this February 12, 1948, at Jackson, Tennessee.

/s/ JOHN WISDOM,

*President.*

Subscribed and sworn to before me this February 12, 1948.

/s/ CLINT B. ROWLETT,

(seal)

*Notary Public.*

My Commission expires April 4, 1949.

This February 12, 1948, at Jackson, Tennessee.

/s/ JOHN WISDOM,

*President.*

*Affidavit*

STATE OF TENNESSEE,

*County of Madison, ss:*

I, John Wisdom, being duly sworn, make oath that I am the President of the West Tennessee Gas Company, the corporation filing the above, and that the statements contained therein are true to the best of my knowledge, information and belief.

/s/ JOHN WISDOM,

*President.*

134 Subscribed and sworn to before me this February 12, 1948.

/s/ CLINT B. ROWLETT,

(Seal)

*Notary Public.*

My Commission expires April 4, 1949.

—d—

135 In the United States Circuit Court of Appeals

*Answer of Mississippi River Fuel Corporation to Intervening  
Petition of Illinois Commerce Commission—Filed Feb. 16, 1948*

Mississippi River Fuel Corporation therein referred to as "Mississippi Corporation") has heretofore filed its intervening petition and claim setting for the basis of its claim for having paid to it

the entire amount of funds paid into this Honorable Court by Interstate Natural Gas Company, Incorporated (herein referred to as "Interstate"), in respect of excess charges collected for gas sold by Interstate to Mississippi Corporation during the pendency of the stay order heretofore entered by this Court on June 14, 1943.

By reason of certain contentions set forth in the petition of intervention filed therein by Illinois Commerce Commission, Mississippi Corporation files this answer in support of its own claim heretofore made in its intervening petition.

1. Mississippi Corporation admits that the Illinois Commerce Commission has jurisdiction over the rates of public utilities in Illinois and that two of such public utilities purchased natural gas from Mississippi Corporation during all of the period of the stay order.

136 2. The gas purchased by Mississippi Corporation from Interstate constitutes 22% of the total gas purchased by Mississippi Corporation for transportation and sale both for resale and for direct sale to industrial customers. Consequently, it is impossible to know just what portion of the gas purchased by Mississippi Corporation from Interstate actually was delivered by Mississippi Corporation to the utility customers in Illinois. Mississippi Corporation delivers natural gas to one industrial customer and two utility customers at many delivery points in the State of Arkansas. It delivers natural gas to two utility customers in the State of Missouri. In the States of Missouri and Illinois there are approximately 35 industrial customers which buy gas from Mississippi Corporation under private contracts not subject to regulation by the Federal Power Commission. The regulatory authority of the Illinois Commerce Commission over such sales is not admitted by Mississippi Corporation.

3. The money with which Mississippi Corporation paid Interstate for the gas purchased from Interstate came from its general funds collected from the sale of gas and it is impossible to identify any particular dollars so paid as having been received from the Illinois Power Company and Union Electric Power Company of Illinois. Likewise, it would be impossible to identify any of the funds deposited in the Court as ever having come from the ultimate consumers in Illinois of those two utility companies, and it is wholly impossible to identify the gas which was sold by Mississippi Corporation to Illinois Power Company and Union Electric Power Company as being the gas sold by Interstate to Mississippi Corporation.

4. Mississippi Corporation denies that it is furnishing a public utility service. Its operations are subject to regulation by the Federal Power Commission under the Natural Gas Act, but no part of said Act characterizes Mississippi Corporation as a public

137 utility, nor is the sale of its gas to distributing companies for resale stated to be a public utility service.

5. Mississippi Corporation refers to its intervening petition herein filed for its claims and denies that it acted solely as an intermediary in any transaction of furnishing gas to the public. It says that it sold gas as a "natural-gas company" under the jurisdiction of the Federal Power Commission which has complete authority over the rates and charges of Mississippi Corporation; that the delivery of gas to a utility customer completed the obligation of Mississippi Corporation and it had no part in the delivery of gas to the ultimate consumers of the utility companies.

6. Mississippi Corporation states that the proposal of Illinois Commerce Commission that funds impounded in this Court be distributed to the estimated 11,452 ultimate consumers in Illinois of the two utility companies referred to would require determination of the reasonableness and unreasonableness of the rates of said Illinois utilities by this Court which has no authority in the premises; that whatever the Federal Power Commission does in the way of a rate order in the pending rate proceeding, Docket G-462, referred to in Mississippi's intervening petition, will determine what rate the two Illinois utilities should receive from Mississippi Corporation. What disposition should be made of any rate reduction to those utilities is a matter within the control of the Illinois Commerce Commission and is not a function of this Court.

138 WHEREFORE, Mississippi Corporation prays that the relief sought by the Illinois Commerce Commission be denied and that the funds deposited to the credit of Mississippi Corporation be paid to it as prayed for in the intervening petition heretofore filed herein.

Respectfully submitted,

MISSISSIPPI RIVER FUEL CORPORATION.

By WILLIAM G. MARBURY,  
Vice President.

WILLIAM A. DOUGHERTY

JAMES L. WHITE

30 Rockefeller Plaza

New York 20, New York

Attorneys for Mississippi River Fuel Corporation.

7139

Duly Sworn to by William G. Marbury

jurat omitted in printing.



140

*Affidavit of Service*

STATE OF NEW YORK

*County of New York, ss:*

Before me, a Notary Public in and for said County and State, personally appeared JAMES LAWRENCE WHITE, the subscriber, who upon being duly sworn did depose and swear that he has caused service of the foregoing copies of "ANSWER OF MISSISSIPPI RIVER FUEL CORPORATION TO INTERVENING PETITION OF ILLINOIS COMMERCE COMMISSION" to be made upon each of the persons whose names appear below by causing the same to be deposited properly addressed thereto with postage prepaid in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 92, Louisiana

Memphis Natural Gas Company  
Memphis, Tennessee

C. C. Crabtree, Esq. and Wesley Harvell, Esq., Attorneys  
Memphis Light, Gas & Water Division of the City of Memphis

Union Planters National Bank Building  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Building  
Monroe, Louisiana

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Assistant General Counsel for Federal Power Commission,  
Respondent  
1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Edward Righter, Esq.  
 Counsel for the City of New Orleans, Respondent  
 Canal Building  
 New Orleans 12, Louisiana

141 Warren O. Coleman, Esq.  
 Attorney for the City of New Orleans, Respondent  
 Whitney Building  
 New Orleans 12, Louisiana

Francis P. Burns, Esq.  
 Attorney for the City of New Orleans, Respondent  
 American Bank Building  
 New Orleans 12, Louisiana

W. C. Perrault, Esq.  
 Attorney for Louisiana Public Service Commission  
 Box 4005  
 State Capitol  
 Baton Rouge, Louisiana

Roland Kizer, Esq.  
 Attorney for the City of Baton Rouge, Louisiana  
 709 Louisiana National Bank Building  
 Baton Rouge, Louisiana

Illinois Commerce Commission  
 Springfield, Illinois—Attention: Mr. Warren Henry

John Randolph, Esq.  
 General Counsel for Missouri Public Service Commission  
 Jefferson City, Missouri

Original signed

JAMES LAWRENCE WHITE.

Subscribed and sworn to before me this 13th day of February,  
 1948.

ANTHONY W. NEWMAN,

N. Y. Co. Clk's No. 27, Reg. No. 56-N-9. Registered in West-  
 Chester County. Commission expires March 30, 1949.

(Seal)

Notary Public.

142 In the United States Circuit Court of Appeals

*Intervening Petition of the Public Service Commission of the State of Missouri—Filed Feb. 46, 1948*

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT:

COMES NOW the Public Service Commission of the State of Missouri (hereafter called Intervenor) and presents this the following as and for its intervening petition in this cause pursuant to the general order of this Honorable Court entered on the 28th day of January, 1948, allowing all interested parties to intervene and become parties to this cause.

1. Intervenor's legal name is "The Public Service Commission of the State of Missouri." As such body it is the legally constituted Commission for the regulation of public utilities operating in the State of Missouri and among such public utilities under the regulation of intervenor are natural gas corporations engaged in the business of distributing natural gas for ultimate consumption in the State of Missouri. Under the laws creating intervenor as the regulatory Commission of the State of Missouri for public utilities, intervenor is given the power to sue and be sued in the courts and to appear in the courts by and through its general counsel in any and all litigation concerning matters affecting public utilities operating in the State of Missouri.

143 2. Intervenor's interest in this cause now arises because a part of the moneys heretofore impounded and now held in the registry of this court pursuant to the previous order of the court were derived from rate payers in the State of Missouri who were users of natural gas in the State of Missouri during the impoundment period. It is a part of the duty of intervenor under the Laws of the State of Missouri to represent the rate payers in the State that are customers of any public utilities operating in the State and to see that there be restored to such rate payers any excess charges for natural gas where the money representing excess rate payments has been impounded by any court.

3. Mississippi River Fuel Corporation has filed with this Honorable Court its verified statement claiming \$1,484,582.53 of the moneys impounded and now held in the registry of this Honorable Court, the claim being based upon the fact that during the impoundment period Mississippi River Fuel Corporation purchased a part of its natural gas requirements from Interstate Natural Gas Company, Inc., the Petitioner in this cause. Mississippi River Fuel Corporation like petitioner in this cause is a Natural Gas Pipe Line within the meaning of the Natural Gas Act and under

the jurisdiction of the Federal Power Commission. Mississippi River Fuel Corporation, during the impoundment period, supplied natural gas to three distributing companies in the State of Missouri, namely: Laclede Gas Light Company, St. Louis County Gas Company, and Missouri Natural Gas Company. Each of said distributing companies, during the impoundment period in this case, purchased their requirements for natural gas at wholesale from Mississippi River Fuel Corporation and in turn distributed and sold said natural gas to the ultimate consumers thereof in the State of Missouri at retail. The Laclede Gas Light Company sold and distributed the gas so purchased from Mississippi River Fuel Corporation to ultimate consumers in the City of St. Louis.

144 Missouri. The St. Louis County Gas Company sold and distributed the gas so purchased from Mississippi River Fuel Corporation to ultimate consumers in the metropolitan area surrounding the City of St. Louis, same being a number of municipalities located in the area of St. Louis county, Missouri. The Missouri Natural Gas Company sold and distributed the gas so purchased from Mississippi River Fuel Corporation to ultimate consumers in a number of smaller cities and towns located in several counties in the State of Missouri in an area lying south of the City of St. Louis and along the eastern side of the State of Missouri. The St. Louis County Gas Company is no longer existent, same having been purchased by and merged with the Laclede Gas Light Company by proper authority of this intervenor, on the ..... day of ....., 1946, so that at the present time all of the ultimate consumers who used the natural gas supplied by Mississippi River Fuel Corporation during the impoundment period are now customers of either the Laclede Gas Light Company or the Missouri Natural Gas Company.

4. During all the impoundment period in this case the Federal Power Commission was in the process of making an investigation of the rates and charges of Mississippi River Fuel Corporation for the natural gas which it was selling at wholesale to gas distribution companies in the State of Missouri and other states. Pursuant to that investigation and a hearing held by the Federal Power Commission, that Commission ordered Mississippi River Fuel Corporation to make a substantial reduction in its wholesale rates for natural gas, and the reduction so ordered was immediately put into effect by Mississippi River Fuel Corporation by the filing with the Federal Power Commission new schedule of rates for wholesale sales of natural gas. The said finding of the Federal Power Commission was based upon the business done by Mississippi River Power Corporation during the year 1943, and was, in effect, a finding that the wholesale rates for natural gas of the Mississippi River Fuel Corporation, during the year 1943 and thereafter, were

145 excessive, not just and reasonable and, therefore, unlawful under the provisions of the Natural Gas Act. Among other provisions of the said Order of the Federal Power Commission finding the wholesale rates of Mississippi River Fuel Corporation to be unlawful was the following:

"The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by \$301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the order rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a 'commodity' charge, and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volumes of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision." (F. P. C. Opinion No. 126, in re: Mississippi River Fuel Corporation, et al., Docket G-462, 4 F. P. C. 340 at 359.)

5. In view of the aforesaid findings by the Federal Power Commission touching the wholesale rates for natural gas of Mississippi River Fuel Corporation that portion of the monies impounded and now held in the registry of this Honorable Court which is now being claimed by Mississippi River Fuel Corporation (\$1,484,582.53) was unlawfully collected from the ultimate consumers of natural gas in the State of Missouri and rightfully belongs to such ultimate consumers and should be ordered by this Honorable Court to be paid to such ultimate consumers in the State of Missouri. By orders of this intervenor and by agreements between this intervenor and the Lackde Gas Light Company (which now includes the St. Louis County Gas Company) and also the Missouri Natural Gas Company, the said distribution companies have consented that all of said impounded monies so unlawfully collected from the ultimate consumers of natural gas in the State of Missouri should be paid to the said ultimate consumers, and said distribution companies, to-wit: Lackde Gas Light Company (including St. Louis County Gas Company) and Missouri Natural Gas Company will, if and when deemed appropriate by this Honorable Court, file with the Court a disclaimer of any and all interest in said impounded funds, and request that this Honorable Court make distribution of said monies to the customers of said distribution companies.

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WHEREFORE Intervenor prays this Honorable Court to make a determination of the issues joined in this cause and by its judgment and decrees to order the impounded monies derived from sales of natural gas in the State of Missouri to be distributed to the ultimate consumers in the State of Missouri, and will the Court make such further determinations and enter such further orders, judgments, and decrees as may be required the premise considered.

PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI.

By JOHN P. RANDOLPH,  
General Counsel.  
WILBUR F. HALL,  
Assistant Counsel.

147

In the  
United States Circuit Court of Appeals

*Answer of Mississippi River Fuel Corporation to Intervening Petition of Public Service Commission of Missouri—Filed Feb. 16, 1948*

Mississippi River Fuel Corporation (herein referred to as "Mississippi Corporation") has heretofore filed its intervening petition and claim setting forth the basis of its claim for having paid to it the entire amount of funds paid into this Honorable Court by Interstate Natural Gas Company, Incorporated (herein referred to as "Interstate"), in respect of excess charges collected for gas sold by Interstate to Mississippi Corporation during the pendency of the stay order heretofore entered by this Court on June 14, 1943.

By reason of certain contentions set forth in the petition of intervention filed herein by Public Service Commission of Missouri, Mississippi Corporation files this answer in support of its own claim heretofore made in its intervening petition.

1. Mississippi Corporation admits that the Public Service Commission of the State of Missouri (herein referred to as the "Missouri Commission") has regulatory authority over public utilities operated in Missouri and that such jurisdiction extends over Laclède Gas Light Company, St. Louis County, Gas Company and Missouri Natural Gas Company, all of which purchased natural gas from Mississippi Corporation during the period of the stay order entered by this Court on June 14, 1943.

148 2. The gas purchased by Mississippi Corporation from Interstate constitutes 22% of the total gas purchased by Mississippi Corporation for transportation and sale both for resale and for direct sale to industrial customers. Consequently, it is impossible to know just what portion of the gas purchased by Mis-

Mississippi Corporation from Interstate actually was delivered by Mississippi Corporation to the utility customers in Missouri. Mississippi Corporation delivers natural gas to one industrial customer and two utility customers at many delivery points in the State of Arkansas. It delivers natural gas to two utility customers in the State of Missouri. In the States of Missouri and Illinois there are approximately 35 industrial customers which buy gas from Mississippi Corporation under private contracts not subject to regulation by the Federal Power Commission. The regulatory authority of the Missouri Commission over such sales is not admitted by Mississippi Corporation.

3. The money with which Mississippi Corporation paid Interstate for the gas purchased from Interstate came from its general funds collected from the sale of gas and it is impossible to identify any particular dollars so paid as having been received from Laeledge Gas Light Company and Missouri Natural Gas Company. Likewise, it would be impossible to identify any of the funds deposited in the Court as ever having come from the ultimate consumers in Missouri of those two utility companies, and it is wholly impossible to identify the gas which was sold by Mississippi Corporation to Laeledge Gas Light Company and Missouri Natural Gas Company as being the gas sold by Interstate to Mississippi Corporation.

4. Laeledge Gas Light Company and St. Louis County Gas Company did not during the stay period distribute straight natural gas to their consumers, but distributed a mixed gas of which the natural gas purchased from Mississippi Corporation was a 149 component. Consequently, it would be impossible to trace the gas sold by Interstate to Mississippi to any consumers of Laeledge Gas Light Company and St. Louis County Gas Company by reason of the other sources of gas used by those companies with which the natural gas purchased from Mississippi Corporation was mixed. Laeledge Gas Light Company did sell straight natural gas to certain industrial customers which was purchased from Mississippi Corporation.

5. Mississippi Corporation admits that St. Louis County Gas Company sold its assets to Laeledge Gas Light Company so that whatever claim St. Louis County Gas Company might have in the premises is now owned by Laeledge Gas Light Company.

6. Referring to the matter set forth in Item 4 of the petition, Mississippi Corporation admits that the Federal Power Commission, during the impoundment period, was engaged in an investigation of its rates and charges for gas sold at wholesale to the distributing companies in Missouri for resale; that a rate reduction was ordered and that the same was put into effect with appropriate reservations to recover from the distributing companies any additional amounts later found to be lawful, and admits that the quoted

portion of the Opinion of the Commission was related to the purchase of gas by Mississippi Corporation from Interstate. However, that rate reduction order has been reversed and the proceeding is now pending before the Federal Power Commission, all as set forth in Mississippi Corporation's intervening petition. Whatever rates will ultimately be determined to be reasonable will be the lawful and legal rates which Mississippi Corporation may charge the utility companies in Missouri and this Court has no jurisdiction or authority to enter any order in respect of the impounded fund relating to those rates. Accordingly, this claim filed by the distributing companies referred to can do nothing more than relate to

150 rates to be fixed by the Federal Power Commission covering the period of its order and this Court has no authority to make any order which would affect the determination of rates during that period which the Federal Power Commission is under direction from the Circuit Court of Appeals for the District of Columbia. Reference is made to the intervening petition and claim of Mississippi Corporation heretofore filed herein for references to the reversal order entered by the Circuit Court of Appeals for the District of Columbia and the present pendency of the rate proceeding before the Federal Power Commission.

7. Mississippi Corporation says that the order of the Commission referred to in the intervening petition of the Missouri Commission recognized that any reduction received from Interstate should be apportioned to the utility customers on the basis of the volumes sold to them. Of the excess charges paid by Mississippi Corporation to Interstate, only approximately 30% could be allocated to all of the utility customers in all states under the Commission's Order. The Missouri Commission's Jurisdiction over the direct sales by Mississippi Corporation is being contested by it and neither the Missouri Commission, the Federal Power Commission nor this Court has any jurisdiction over such sales. The petition of the Missouri Commission apparently claims that the entire amount of excess charges relate to gas which was sold by utility companies in Missouri. As heretofore stated, it is impossible to determine the ultimate destination of the gas in question, but the claims made by the Missouri Commission are even more extensive than the Order of the Federal Power Commission referred to in its petition.

WHEREFORE, Mississippi Corporation prays that the relief sought by the Public Service Commission of the State of

161 Missouri be denied and that the entire amount of funds impounded to its credit in this Court be paid to it.

Respectfully submitted,

MISSISSIPPI RIVER FUEL CORPORATION.

By WILLIAM G. MARDERY,

*Vice President.*

WILLIAM A. DOUGHERTY,  
Original Signed

JAMES LAWRENCE WHITE,

JAMES L. WHITE,

30 Rockefeller Plaza,

New York 20, New York.

*Attorneys for Mississippi River Fuel Corporation.*

152

*Duly sworn to by William G. Marbury  
jurat omitted in printing.*

153

*Affidavit of Service*

STATE OF NEW YORK,

*County of New York, ss:*

Before me, a Notary Public in and for said County and State, personally appeared JAMES LAWRENCE WHITE, the subscriber, who upon being duly sworn did depose and swear that he has caused service of the foregoing copies of "ANSWER OF MISSISSIPPI RIVER FUEL CORPORATION TO INTERVENING PETITION OF PUBLIC SERVICE COMMISSION OF MISSOURI" to be made upon each of the persons whose names appear below by causing the same to be deposited properly addressed thereto with postage prepaid in a United States Post Office regularly maintained by the Government of the United States. Service has so been made upon:

United Gas Pipe Line Company  
(For the Account of Memphis Natural Gas Company)  
Shreveport 02, Louisiana

Memphis Natural Gas Company  
Memphis, Tennessee

C. C. Crabtree, Esq.

and

Wesley Harvell, Esq., Attorneys  
Memphis Light, Gas and Water Division of the City of  
Memphis

Union Planters National Bank Building  
Memphis, Tennessee

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Interstate Natural Gas Company  
405 Ouachita National Bank Building  
Monroe, Louisiana

Leon M. Fuquay, Secretary  
Federal Power Commission  
Washington 22, D. C.

Charles E. McGee, Esq.  
Assistant General Counsel for Federal Power Commission  
Respondent

1800 Pennsylvania Avenue, N. W.  
Washington, D. C.

Edward Rightor, Esq.  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana

154. Warren O. Coleman, Esq.  
Counsel for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Francis P. Burns, Esq.  
Counsel for the City of New Orleans, Respondent  
American Bank Building  
New Orleans 12, Louisiana

W. C. Perrault, Esq.  
Attorney for Louisiana Public Service Commission  
Box 4005  
State Capitol  
Baton Rouge, Louisiana

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana

Illinois Commerce Commission  
Springfield, Illinois—Attention: Mr. Warren Henry

John Randolph, Esq.  
General Counsel for Missouri Public Service Commission  
Jefferson City, Missouri

Original Signed

JAMES LAWRENCE WHITE

Subscribed and sworn to before  
me this 13th day of February, 1948.

(Seal) ANTHONY W. NEWMAN,  
Notary Public.

N. Y. Co. Clk's No. 27, Reg. No. 56-N-9  
Registered in Westchester County  
Commission Expires March 30, 1949.



155 In United States Circuit Court of Appeals

*Argument and Submission—February 16th, 1948.*

On this day the motion of Interstate Natural Gas Company, Incorporated, for an Order for Distribution of Funds was called, and, after argument by William A. Dougherty, Esq., for petitioner and Mississippi River Fuel Corporation, Intervener; and Bradford Ross, Esq., General Counsel for Federal Power Commission, Respondent; and Forney Johnston, Esq., for Southern Natural Gas Company; C. Huffman Lewis, Esq., for United Gas Pipe Line; Edward P. Russell, Esq., for Memphis Natural Gas Company; Warren Henry, Esq., for Illinois Commerce Commission; Chas. C. Crabtree, Esq., for Memphis Light, Gas & Water Division; Wilbur F. Hall, Esq., for Missouri Public Service Commission, and W. Russell Rice, Esq., for City of Jackson, Tennessee, Interveners, was submitted to the Court.

156

In the

United States Circuit Court of Appeals

*Amended Petition of Intervention of United Gas Pipe Line Company—Filed Feb. 19, 1948*

Now COMES United Gas Pipe Line Company whose Petition to Intervene has been allowed in the above proceeding and with leave of Court first obtained files this its amended Petition of Intervention.

1.

Intervenor asserts its rights to receive all sums of money deposited in the Registry of this Court on account of natural gas sold to Intervenor by Interstate Natural Gas Company for the period June 1st, 1943, to December 10th, 1945, and which gas was resold by Intervenor to Memphis Natural Gas Company.

2.

Should payment of said funds be ordered made direct to Memphis Natural Gas Company, Intervenor will make no objection thereto in the event it be relieved from any and all liability to any and all parties whomsoever in connection therewith.

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3.

Intervenor upon receipt of said funds will promptly transmit same in full to Memphis Natural Gas Company.

4.

Intervenor insists that there are no parties lawfully entitled to receive said funds except Intervenor.

WHEREFORE, Intervenor prays that this its amended Petition of Intervention may be allowed and that an order be entered directing that all of said funds be paid to Intervenor as hereinabove set forth. Intervenor prays for all orders necessary and for full, general and equitable relief in the premises and for costs.

C. HUFFMAN LEWIS,  
Counsel for  
United Gas Pipe Line Company.

C. HUFFMAN LEWIS,  
1525 Slattery Building,  
Shreveport, Louisiana.

Of Counsel:

WILKINSON, LEWIS & WILKINSON,  
Shreveport, Louisiana.

158 *Duly sworn to by M. A. Abernathy  
jurat omitted in printing.*

Let the Amended Motion be filed.

(Signed) J. C. HUTCHESON, JR.,  
U. S. Circuit Judge.

Feb. 19, 1948.

159 *Certificate of Service*

I HEREBY CERTIFY that I have this day served a copy of the attached amended petition of intervention of United Gas Pipe Line Company on the following named parties of record in this proceeding, by mailing a copy thereof, postage prepaid to the addresses shown on the list below:

By C. HUFFMAN LEWIS,  
Counsel for  
United Gas Pipe Line Company.

February 18, 1948.

Federal Power Commission  
Bradford Ross, General Counsel  
1800 Penn. Ave.  
Washington 25, D. C.

Public Service Commission of Missouri  
Hon. Archie McDuffie, Secretary  
Jackson, Miss.

Public Service Commission of Missouri  
Hon. Fred H. Carr  
Jefferson City, Mo.

Public Service Commission of Louisiana  
Hon. P. A. Frye, Secretary  
Baton Rouge, La.

Public Service Commission of Arkansas  
Hon. M. H. Mehaffy, Secretary  
Little Rock, Ark.

Henry P. Dart, Jr.  
1008 Canal Bldg.  
New Orleans 12, La.

Alden T. Shotwell  
Ouachite Nat'l Bk. Bldg.  
Monroe, La.

William A. Dougherty  
30 Rockefeller Plaza  
New York, N. Y.

Roland C. Kizer  
709-10 La. Nat'l Bk. Bldg.  
Baton Rouge, La.

Chas. C. Crabtree  
507 V & P Bldg.  
Memphis, Tenn.

Forney Johnston  
First National Bk. Bldg.  
Birmingham, Ala.

160 Memphis Natural Gas Company  
Sterick Bldg.  
Memphis, Tenn.

Mississippi River Fuel Corp.,  
William G. Marbury, Vice President  
407 North 8th St.  
St. Louis 1, Mo.

W. C. Perrault, Esq.  
First Ass't. Atty. General of Louisiana  
4005 State Capitol Bldg.  
Baton Rouge, La.

Illinois Power Company  
Allen VanWyck, President  
Decatur, Ill.

Union Electric Power Company  
H. C. Scott, Manager  
E. St. Louis, Ill.

Southern Natural Gas Company  
Birmingham, Alabama

Edward P. Russell  
29th Floor, Sterick Bldg.  
Memphis, Tenn.

Russell Rice  
201 Bond Bldg.  
Jackson, Tenn.

*Attorney for City of Jackson.*

161

In the

United States Circuit Court of Appeals  
For the Fifth Circuit

No. 10701.

Interstate Natural Gas Company, Incorporated, *Petitioner,*

v.

Federal Power Commission, Louisiana Public Service Commission,  
City of New Orleans, Louisiana, City of Baton Rouge, Louis-  
iana, *Respondents.*

*Petition for Review of an Order of the Federal Power Commission,  
sitting at Washington, D. C.*

*Opinion Filed March 12, 1948.*

*On Motion for an Order for Distribution of Funds.*

Before HUTCHESON, HOLMES, and McCORD, Circuit Judges.

PER CURIAM: Admitting that it is not entitled to have re-  
turned to it sums it deposited in this court pursuant to the  
stay order of December 5, 1944, petitioner is here asking  
an order directing the distribution of such sums and absolving  
petitioner from further liability or accountability in respect thereto.  
The matter comes up in this way. By an order entered April  
27, 1943, modified June 9, 1943, the Federal Power Commission

162

reduced the rates and charges of Interstate Natural Gas Company, Inc., on sales made by Interstate in the Monroe field in Louisiana to pipe line companies, each being a natural gas company subject to the jurisdiction of the Commission.

Contesting this order as beyond the jurisdiction of the Commission, Interstate filed its petition for a review in this court, and at the same time applied to this court for, and was granted, a stay of the Commission's order, conditioned upon Interstate's paying into the registry of this court the monthly difference between payments under existing rates and those required under the rate reducing order of the Commission.

163 During the pendency of the review proceeding, Interstate accepted certain of the reductions ordered by the Commission which related to gas delivered to distributing companies in New Orleans and adjacent territory, rate schedules were filed and accepted by the Commission, and, by agreement of all parties, that portion of the impounded funds relating to the sales in question were paid to the distributing companies in the New Orleans area, and excess payment on account thereof was returned to Interstate.

The case then proceeded to hearing on the question of the jurisdiction of the Commission over sales made by Interstate in the Monroe field in Louisiana to Mississippi River Fuel Corporation, Southern Natural Gas Company, and United Gas Pipe Line Company for account of Memphis Natural Gas Company.

This court affirmed<sup>2</sup> the order of the Commission reducing Interstate's rates to the three pipe line companies. Its judgment was affirmed in the Supreme Court, and commencing with deliveries for the month of October, 1947, collections have been made by Interstate at the rate fixed by the order of the Commission, and, therefore, no further deposits are being made pursuant to the stay order. The rate schedules filed as provided for in the Commission's order were made effective for all bills rendered to the pipe line companies on and after July 15, 1943.

The Order specifically provided that:

"The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act. Upon receipt of each deposit the Clerk of this Court shall notify the Federal Power Commission stating the amount of such deposit and the total amount then on deposit in said fund."

and further:

"Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."



In addition to the sums deposited in the registry of the court, it is recognized that Interstate owes each of the companies an additional amount which it has not deposited but which it agrees to, and will, pay as a part of the distribution ordered.

The three pipe line companies above named, who paid the excess charges to Interstate, have filed interventions asking that the charges exacted from them in excess of the Commission's order be returned to them.

The Federal Power Commission, the Public Service Commission of the State of Missouri, Memphis Light, Gas & Water Division of the City of Memphis, Illinois Commerce Commission, and the City of Jackson, Tennessee, have appeared to oppose the distribution to the pipe line companies and to insist that the funds be distributed to the ultimate consumers of the gas purchased by the pipe line companies from Interstate or to such other persons and institutions as may appear equitably entitled thereto.

A careful consideration of the opposing contentions, in the light of the undisputed facts leaves us in no doubt that whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect of such overpayments, it is not our function to search out or declare them.<sup>3</sup> The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof.

Let an appropriate order be drawn and presented for entry.

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In the

United States Circuit Court of Appeals

*Application of Respondent Federal Power Commission for an Order Staying the Issuance of the Mandate—Filed April 1, 1918.*

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The Federal Power Commission, a Respondent, by its counsel, hereby respectfully presents its application for an order staying the issuance of the mandate of this Honorable Court in the above-

<sup>3</sup>Central States v. Muscatine, 324 U. S. 138.

entitled cause, under and pursuant to the provisions of Section 8(d) of the Act of February 13, 1925, 43 Stat. 940, 28 U. S. C. A. Section 350, and in support of its application shows the following:

1. On March 12, 1948, this Honorable Court issued an opinion adverse to Respondent Federal Power Commission on Petitioner's motion for an order directing the distribution of funds impounded during the pendency of a petition for review in this Honorable Court of an order of the Federal Power Commission reducing the rates and charges of Petitioner.

2. Pursuant to Rule 32 of the Rules of this Honorable Court the mandate will issue, unless otherwise ordered, on or after April 2, 1948.

3. Respondent Federal Power Commission requires additional time to consider whether a petition for a writ of certiorari should be made to the Supreme Court of the United States and, in the event it is determined that a petition for a writ of certiorari should be filed, to prepare and file such petition.

167 4. This application is filed in good faith, is not interposed for the purpose of delay, and if it be determined that a petition for a writ of certiorari should be filed, such petition will be prepared and filed without delay.

WHEREFORE, Respondent Federal Power Commission requests that this Honorable Court enter its order staying the issuance of the mandate in the above-entitled cause to and including May 22, 1948, and in the event a petition for a writ of certiorari is docketed in the Clerk's Office of the Supreme Court of the United States on or before May 22, 1948, then until after the Supreme Court passes upon the petition.

Respectfully submitted,

BRADFORD ROSS,  
General Counsel,  
Federal Power Commission.

Dated at Washington, D. C., March 30, 1948.

168 Affidavit of Service

UNITED STATES OF AMERICA,  
District of Columbia, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Bradford Ross, General Counsel for the Federal Power Commission, who upon being first duly sworn, on oath did depose and say that he duly served copies of the foregoing

motion upon each of the persons whose name appears below, by depositing the same in the United States Post Office at Washington, D. C., in sealed envelopes properly addressed thereto with postage prepaid, on the 30th day of March, 1948. Service has so been made upon:

William A. Dougherty, Esq.  
Counsel for Interstate Natural Gas Company, Incorporated  
and Mississippi River Fuel Corporation

30 Rockefeller Plaza  
New York 20, New York  
United Gas Pipe Line Company  
Shreveport 92, Louisiana

Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Mississippi River Fuel Corporation  
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Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
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New Orleans 12, Louisiana

Francis P. Burns, Esq.  
Attorney for the City of New Orleans, Respondent  
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Baton Rouge, Louisiana

Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana

Warren Henry, Esq.  
 Illinois Commerce Commission  
 230 Centennial Building  
 Springfield, Illinois

Forney Johnston, Esq.  
 Attorney for Southern Natural Gas Company  
 First National Building  
 Birmingham 3, Alabama

Russell Rice, Esq.  
 Attorney for the City of Jackson  
 201 Bond Building  
 Jackson, Tennessee

Alden T. Shotwell, Esq.  
 Attorney for Memphis Natural Gas Company  
 Ouachita National Bank  
 Monroe, Louisiana

Edw. P. Russell, Esq.  
 Attorney for Memphis Natural Gas Company  
 29th Floor, Sterick Building  
 Memphis, Tennessee

Gordon Persons, Esq.  
 President, Alabama Public Service Commission  
 Montgomery 1, Alabama

John P. Randolph, Esq.  
 General Counsel, Missouri Public Service Commission  
 Jefferson City, Missouri

Chas. C. Crabtree, Esq.  
 Attorney for Memphis Light, Gas and Water Division  
 507 Union Planters Bank Building  
 Memphis, Tennessee

Walter R. McDonald, Esq.  
 Chairman, Georgia Public Service Commission  
 Atlanta, Georgia

Henry P. Dart, Jr., Esq.  
 Attorney for Interstate Natural Gas Company, Incorporated  
 1008 Canal Building  
 New Orleans, Louisiana

170 C. Huffman Lewis, Esq.  
 Attorney for the United Gas Pipe Line Company  
 1525 Slattery Building  
 Shreveport, Louisiana

(Signed) BRADFORD ROSS.

Subscribed and sworn to before me this 30th day of March, 1948.

(SEAL)

(Signed) BERNICE P. STONE,  
*Notary Public in and for the  
 District of Columbia, Washington.*

My commission expires June 14, 1949.

171 In United States Circuit Court of Appeals

No. 10701.

Interstate Natural Gas Company, Incorporated, a Corporation,

Federal Power Commission, Louisiana Public Service Commission,  
 City of New Orleans, Louisiana, City of Baton Rouge, Louis-  
 iana.

*Order Directing Distribution of Funds—May 12, 1948.*

This cause came on for hearing on the motion filed on December 22, 1947, of Interstate Natural Gas Company, Incorporated, petitioner herein, for an order directing the distribution of funds heretofore deposited in the registry of this Court pursuant to a stay of the rate reduction order of the Federal Power Commission, heretofore affirmed in this proceeding, said stay having been granted by an Order of this Court on June 14, 1943.

Pursuant to the order of this Court entered on January 28, 1948, intervening petitions and claims were filed by Memphis Natural Gas Company, Mississippi River Fuel Corporation and Southern Natural Gas Company. United Gas Pipe Line Company filed an original and amended petition of intervention asserting its rights to receive its part of said funds, and stating that upon receipt of same it would promptly remit same in full to Memphis Natural Gas Company.

The Federal Power Commission, the Public Service Commission of the State of Missouri, Memphis Light, Gas and Water Division of the City of Memphis, Illinois Commerce Commission and the City of Jackson, Tennessee, have filed intervening petitions oppos-



ing the distribution of the deposited funds to the claimant pipe line companies named above.

Pursuant to said stay order there has been paid into the registry of this Court \$2,444,573, representing amounts collected in excess of the rates finally approved by the Federal Power Commission, and petitioner has stated that additional monies in excess of the approved rates were collected but not deposited in the registry of this Court. All of said monies were collected from the following named purchasers of gas from petitioner and the amounts due to each of said purchases of gas by reason of said excess collections are as follows:

<i>Due to</i>	<i>Paid into Court</i>	<i>Not paid into Court</i>	<i>Total</i>
United Gas Pipe Line Company (Account Memphis Natural Gas Company) .....	\$ 323,948.32	\$ 20,658.06	\$ 344,606.38
Memphis Natural Gas Company—direct .....	235,646.06	12,213.38	247,859.44
Mississippi River Fuel Corporation .....	1,309,729.72	174,852.81	1,484,582.53
Southern Natural Gas Company .....	575,248.90	112,907.81	688,156.71
Total.....	\$2,444,573.00	\$320,632.06	\$2,765,205.06

Each of the intervening pipe line companies enumerated above agrees that the total amounts set forth as having been collected from it represent the correct amounts collected from it in excess of the rates finally approved and filed with the Federal Power Commission.

Hearings on the matter of distribution of said funds were held on January 28, 1948, and February 16, 1948, at which latter hearing oral arguments were heard. Upon consideration of all the intervening petitions and claims, answers thereto and briefs filed by the petitioner and all intervenors and the oral arguments, the Court HEREBY ORDERS:

I. That the Clerk of this Court be, and hereby is directed to disburse the funds paid into the registry of the Court to each of the following companies in the amount shown opposite the name of each, viz:

United Gas Pipe Line Company, for the Account of Memphis Natural Gas Company.....	\$ 323,948.32
Memphis Natural Gas Company.....	235,646.06
Mississippi River Fuel Corporation.....	1,309,729.72
Southern Natural Gas Company.....	575,248.90
Total.....	\$2,444,573.00

173 2. That petitioner pay to each of the said named companies the amount shown opposite the name of each, viz:

United Gas Pipe Line Company, for the Account of Memphis Natural Gas Company.....	\$ 20,658.06
Memphis Natural Gas Company.....	12,213.38
Mississippi River Fuel Corporation.....	174,852.81
Southern Natural Gas Company.....	112,907.81
Total.....	\$320,632.06

which represents a sum of money not paid into the registry of the Court, but admitted by petitioner to have been collected from each of the said companies in excess of the rates finally approved and filed with the Federal Power Commission.

3. The foregoing payments by the Clerk of this Court and by petitioner shall be without prejudice to the rights, if any, of ultimate consumers or others to hold United Gas Pipe Line Company, Memphis Natural Gas Company, Mississippi River Fuel Corporation and Southern Natural Gas Company to account in respect thereof, provided, however, that upon payment by United Gas Pipe Line Company to Memphis Natural Gas Company of the foregoing amounts ordered paid to United Gas Pipe Line Company said company shall be relieved from any and all liability to any and all parties whomsoever in connection therewith, and the rights, if any, of ultimate consumers or others in respect of said amounts shall be exercised against Memphis Natural Gas Company in the same manner as in respect of the amounts paid directly to Memphis Natural Gas Company.

4. Upon the distribution by the Clerk of this Court of the funds as set forth in paragraph 1 above and the payments by petitioner of the amounts set forth in paragraph 2 above, the acceptance thereof by United Gas Pipe Line Company, Memphis Natural Gas Company, Mississippi River Fuel Corporation and Southern Natural Gas Company shall operate and be taken as a waiver by each of all further demands by each upon the funds impounded in this proceeding, and said petitioner shall be forever and completely absolved from any and all

liability in respect and arising out of said Stay Order entered June 14, 1943.

5. All costs incurred herein including those attributable to the payment of the said amounts into the registry of this Court shall be paid by petitioner.

Approved for the Court:

(Signed) J. C. HUTCHESON, JR.,  
*Presiding Judge.*

(Signed) E. R. HOLMES,  
*U. S. Circuit Judge.*

(Signed) LEON McCORD,  
*U. S. Circuit Judge.*

Dated May 12, 1948.

175 In United States Circuit Court of Appeals

No. 10701

Interstate Natural Gas Company, Incorporated,

v.

Federal Power Commission, Louisiana Public Service Commission,  
City of New Orleans, Louisiana, City of Baton Rouge, Louisiana.

*Order Staying Execution of Order to Distribute Funds*  
*May 15, 1948.*

Pursuant to the motion of the FEDERAL POWER COMMISSION, IT IS ORDERED that the order of this Court to distribute the funds entered on May 12th, 1948, be stayed until May 22nd, 1948, pending the filing of a petition to the Supreme Court of the United States for a writ of certiorari, and in the event that said petition for certiorari is filed in the Supreme Court on or before May 22nd, 1948, then until the Supreme Court passes upon said petition.

IT IS FURTHER ORDERED the counsel for the FEDERAL POWER COMMISSION notify the Clerk of this Court on or before May 22nd, 1948, if the petition for certiorari is filed, otherwise the Clerk of this Court is authorized to distribute the funds as provided by the order of this Court.

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In the  
United States Circuit Court of Appeals

*Application of Respondent Federal Power Commission for a  
Further Stay of Order. Filed May 21, 1948.*

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Federal Power Commission, a Respondent, by its counsel, hereby respectfully presents its application for an order further staying the order of this Honorable Court in the above-entitled cause, under and pursuant to the provisions of Section 8(d) of the Act of February 43, 1925, 43 Stat. 940, 28 U. S. C. A. Section 350, and in support of its application shows the following:

1. On May 12, 1948, this Honorable Court issued its order directing the distribution of funds impounded during the pendency of a petition for review in this Honorable Court of an order of the Federal Power Commission reducing the rates and charges of Petitioner and, on that same date, pursuant to the application of Respondent Federal Power Commission, filed April 1, 1948, stayed the order until May 22, 1948, and in the event a petition for a writ of certiorari is docketed in the Clerk's Office of the Supreme Court of the United States on or before that date, then until after the Supreme Court passes upon the petition.

2. After careful consideration of the question, the Federal Power Commission requested the Solicitor General of the United States, who represents the Commission before the Supreme Court of the United States, to file a petition for a writ of certiorari to review the order of this Honorable Court relating to the impounded funds.

3. The Solicitor General has had no previous familiarity with the proceeding and presently has the Commission's request under study. Additional time is required by the Solicitor General for consideration of the Commission's request.

4. In view of the foregoing it is unlikely that a petition for a writ of certiorari, if authorized, can be prepared and filed by May 22, 1948, and a further stay of the order is necessary to prevent and avoid the complications that would result if distribution of the funds takes place and there is a necessity for following the funds into the hands of the recipients.

5. This application is filed in good faith and not interposed for the purpose of delay. If a petition for writ of certiorari is authorized, it will be filed at the earliest possible time.

WHEREFORE, Respondent Federal Power Commission requests that this Honorable Court enter its order further staying its order of May 12, 1948, in the above-entitled cause to and including

June 22, 1948; and in the event a petition for a writ of certiorari is docketed in the Clerk's Office of the Supreme Court of the United States on or before June 22, 1948, then until after the Supreme Court passes upon the petition.

Respectfully submitted,

BRADFORD ROSS,  
General Counsel,  
Federal Power Commission.

Dated at Washington, D. C., May 17, 1948.

178

*Affidavit of Service*

UNITED STATES OF AMERICA,  
District of Columbia, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Bradford Ross, General Counsel for the Federal Power Commission, who upon being first duly sworn, on oath did depose and say that he duly served copies of the foregoing motion upon each of the persons whose name appears below, by depositing the same in the United States Post Office at Washington, D. C., in sealed envelopes properly addressed thereto with postage prepaid, on the 17th day of May, 1948. Service has so been made upon:

William A. Dougherty, Esq.,  
Counsel for Interstate Natural Gas Company, Incorporated  
and Mississippi River Fuel Corporation  
30 Rockefeller Plaza  
New York 20, New York

United Gas Pipe Line Company  
Shreveport 92, Louisiana  
Southern Natural Gas Company  
Watts Building  
Birmingham, Alabama

Mississippi River Fuel Corporation  
407 North Eighth Street  
St. Louis 1, Missouri

Edward Rightor, Esq.,  
Counsel for the City of New Orleans, Respondent  
Canal Building  
New Orleans 12, Louisiana



Warren O. Coleman, Esq.  
Attorney for the City of New Orleans, Respondent  
Whitney Building  
New Orleans 12, Louisiana

Francis P. Burris, Esq.  
Attorney for the City of New Orleans, Respondent  
American Bank Building  
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Box 4005  
State Capitol  
Baton Rouge, Louisiana

179 Roland Kizer, Esq.  
Attorney for the City of Baton Rouge, Louisiana  
709 Louisiana National Bank Building  
Baton Rouge, Louisiana

Warren Henry, Esq.  
Illinois Commerce Commission  
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Springfield, Illinois

Forney Johnston, Esq.  
Attorney for Southern Natural Gas Company  
First National Building  
Birmingham 3, Alabama

Russell Rice, Esq.  
Attorney for the City of Jackson  
201 Bond Building  
Jackson, Tennessee

Alden T. Shotwell, Esq.  
Attorney for Memphis Natural Gas Company  
Ouachita National Bank  
Monroe, Louisiana

Edw. P. Russell, Esq.  
Attorney for Memphis Natural Gas Company  
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Memphis, Tennessee

Gordon Persons, Esq.  
President, Alabama Public Service Commission  
Montgomery 1, Alabama

John P. Randolph, Esq.  
General Counsel, Missouri Public Service Commission  
Jefferson City, Missouri

Chas. C. Crabtree, Esq.  
Attorney for Memphis Light, Gas and Water Division  
507 Union Planters Bank Building  
Memphis, Tennessee

Walter R. McDonald, Esq.  
Chairman, Georgia Public Service Commission  
Atlanta, Georgia

Henry P. Dart, Jr., Esq.  
Attorney for Interstate Natural Gas Company, Incorporated  
1008 Canal Building  
New Orleans, Louisiana

180 C. Huffman Lewis, Esq.  
Attorney for the United Gas Pipe Line Company  
1525 Slattery Building  
Shreveport, Louisiana

BRADFORD ROSS.

Subscribed and sworn to before me this 17th day of May, 1948.

BERNICE P. STONE,  
*Notary Public in and for the  
District of Columbia, Washington.*

My commission expires June 14, 1949.

181 In United States Circuit Court of Appeals

*Order Further Staying Execution of Order to Distribute Funds—  
May 21th, 1948.*

Pursuant to the motion of the FEDERAL POWER COMMISSION, IT IS ORDERED that the order of this Court to distribute the funds entered on May 12th, 1948, be further stayed until June 22nd, 1948, pending the filing of a petition in the Supreme Court of the United States for a writ of certiorari, and in the event that said petition for certiorari is filed in the Supreme Court on or before June 22nd, 1948, then until the Supreme Court passes upon said petition.

IT IS FURTHER ORDERED that counsel for the FEDERAL POWER COMMISSION notify the Clerk of this Court on or before June

22nd, 1948, if the petition for certiorari is filed, otherwise the Clerk of this Court is authorized to distribute the funds as provided by the order of this Court.

182 Clerk's Certificate to foregoing transcript omitted in printing.



## Supreme Court of the United States

No. 109, October Term, 1948

*Order allowing certiorari*

Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



Supreme Court of the United States

No. 188, October Term, 1948

*Order allowing certiorari*

Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.





## Supreme Court of the United States

No. 209, October Term, 1948

*Order allowing certiorari*

Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 212, October Term, 1948

*Order allowing certiorari*

Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.







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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 109**

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**FEDERAL POWER COMMISSION, ET AL., PETITIONERS**

**v.**

**INTERSTATE NATURAL GAS COMPANY, INCORPORATED, ET AL.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Fifth Circuit, directing the distribution of impounded funds, entered in the above-entitled case on May 12, 1948.

## **OPINION BELOW**

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

## **JURISDICTION**

The order of the Circuit Court of Appeals was entered on May 12, 1948 (R. 109-112). The juris-



diction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

Pending judicial review of an order of the Federal Power Commission (Commission) under the Natural Gas Act, directing Interstate Natural Gas Company, Incorporated, (Interstate) to reduce its wholesale interstate rates for natural gas, there accumulated, pursuant to a stay order issued by the court below, a fund of \$2,765,205, representing the difference between the rates prescribed by the Commission and the rates collected by Interstate under the stay order. After the Commission's order was sustained by this Court in *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682, Interstate moved in the court below for an order directing the distribution of the accumulated fund. The court below, notwithstanding the provision in its original stay order that the money was "to be returned to [the] ultimate consumers of gas, or other persons \* \* \* as contemplated by the provisions of the National Gas Act", considered itself compelled by this Court's decision in *Central States Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers from Interstate, who were themselves natural gas companies, as defined by the Natural Gas Act, and thus subject exclusively to the jurisdiction of the Commission in respect of their wholesale sales. Their rates, in

turn, during the impoundment period, had been found by the Commission to have been excessive without regard to the lower costs which would result from the Interstate reduction and during or immediately prior to the impoundment period had been ordered reduced to reasonable levels. The questions presented are:

(1) Whether the *Central States* case here compels the distribution of the accumulated fund to Interstate's immediate purchasers as a matter of law. And, if so,

(2) Whether the *Central States* case should be reexamined and either modified or disapproved.

#### STATEMENT

The Federal Power Commission, on April 27, 1943, ordered Interstate to reduce its rates on and after May 15, 1943, by \$1,100,345 per annum as applied to its 1941 volume of sales. 3 F.P.C. 416, 432, 434-435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F.P.C. 1018.<sup>1</sup> On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit a petition for review of so much of the Commission's order as pertained to its rates on sales for resale to Mississippi River Fuel Corporation (Mississippi), Southern Natural Gas Company (Southern Natural), and

<sup>1</sup> The Commission modified its order to reduce the amount of the rate reduction by \$8,762 to \$1,091,583, and postponed the effective date to June 15, 1943.

United Gas Pipe Line Company (United Gas) for sale to Memphis Natural Gas Company (Memphis), which the Commission had found to be excessive in the amount of \$596,320 per year.<sup>2</sup> The petition for review was thereafter denied by the Circuit Court of Appeals, Judge Waller dissenting (*Interstate Natural Gas Co. v. Federal Power Commission*, 156 F. 2d 949), and this Court, on June 16, 1947, affirmed. 331 U. S. 682. Interstate's petition for rehearing was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October 1947.

Ancillary to its petition for review in the Circuit Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. On June 14, 1943, the stay was granted on the condition that Interstate pay into the court's registry the monthly difference between payments under the existing rates and those required under the Commission's order (R. 1, 2). The stay order placed the entire expense of impounding the funds upon Interstate and provided that no interest should be charged Interstate unless allowed by the court upon application (R. 2). It further provided (R. 2):

The amounts so deposited shall remain on deposit subject, however, to the further Order

<sup>2</sup> By stipulation, Interstate withdrew its assignments of error in so far as they related to the remaining portion of the Commission's rate order.

or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act.

\* \* \* \* \*

Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds.

Pursuant to this order, Interstate deposited \$2,<sup>2</sup> 444,573 in the registry of the court. Some \$320,000 more, not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay (R. 43, 52, 75).

On December 18, 1947, subsequent to this Court's denial of rehearing, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis, and Memphis (R. 16-19).<sup>3</sup> All four companies thereupon moved to intervene in the proceeding (R. 42-48, 49-51, 71-81, 100-103), and intervention was allowed (R. 67). United Gas claimed an allocable share on behalf of Memphis to which it

<sup>3</sup> The sales of natural gas to United Gas involved in that portion of the Commission's order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

had resold the gas it had purchased from Interstate. (R. 100). The other three purchasers, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged, in reliance on *Central States Co v. City of Muscatine*, 324 U. S. 138,<sup>4</sup> that the court had no choice but to distribute the monies to them subject to whatever rights the ultimate consumers might have under state law. The Illinois Commerce Commission, the Public Service Commission of Missouri, the Memphis Light, Gas and Water Division of the City of Memphis, and the City of Jackson, Tennessee, also intervened (R. 68-71, 92-95, 24-41, 81-87). They, together with the Commission, urged in opposition to the claims of the purchasing companies that the *Central States* case was not here applicable inasmuch as the claiming companies were "natural gas companies" whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. The Commission further pointed out that voluntary rate reductions and Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess.

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<sup>4</sup> The purchasing companies also relied on the unreported *per curiam* opinion of the Eighth Circuit Court of Appeals in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, ordering distribution of allocable shares to Panhandle's non-disclaiming customers. The Eighth Circuit there based its opinion on the *Central States* case.



The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipeline companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipeline companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof" (R. 105). The court, accordingly, entered an order directing that the fund be distributed to Interstate's immediate purchasers, in accordance with the terms of its opinion (R. 109-112).

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the *Central States* case is here applicable.
2. In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to immediate purchasers of natural gas from Interstate.
3. In ordering the distribution of that fund to these purchasers.



## REASONS FOR GRANTING THE WRIT

The court below, in holding that it was required by *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, to order the distribution of the accumulated fund to Interstate's immediate purchasers, improperly extended the *Central States* case to a situation in which there remains no means of testing the right of the immediate purchasers to retain this fund. Whether *Central States* goes that far and leaves consumers and state agencies completely remediless is a question of importance which should be settled by this Court.

1. In the *Central States* case, this Court held purchasers are themselves "natural gas companies" that a federal court had no power to determine whether the funds accumulated pursuant to its stay order, pending review of a Commission order directing a "natural gas company" to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or to its customers, "that being a legislative function of the State of Iowa" (pp. 143-144). In that case, the immediate purchaser was a local distributing company, subject to regulation, if at all, only in accordance with local Iowa law. The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intrastate distribution and sale" (p. 144).

The question in this case is whether the *Central States* decision applies where the immediate pur-

within the meaning of, and subject to the Natural Gas Act, and deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated fund to any one but these immediate purchasers.<sup>5</sup> Nothing in the rationale of the *Central States* decision requires such a result. For in this case the question does not arise out of conflicting claims of a local distributing company and its customers, a matter which this Court treated as being subject to state control. Rather, the immediate purchasers here are themselves "natural gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce which is subject to

<sup>5</sup> If it is not deemed mandatory to distribute the impounded fund to the immediate purchasers, a substantial proportion of the fund will probably reach the ultimate consumers. The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, voluntarily filed a disclaimer of its allocable share (R. 86-87) and the intervention of the Missouri Public Service Commission stated that Laclede Gas Light Company and the Missouri Natural Gas Company would also disclaim their share in favor of their ultimate consumers (R. 93-94). When the United Gas costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which in turn passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission v. Interstate Natural Gas Co., Inc., et al.*, F.P.C. Docket Nos. G-149 and G-132, Order of June 26, 1944.

Experience in other similar distribution proceedings where the percentage of disclaimers, although progressively decreasing, has until this case usually been very high (e.g., 99.5% of the fund disclaimed in the *Natural Gas Pipeline* refund, which was the first such proceeding, and which gave rise to the *Central States* case; 80% in the *Panhandle* refund proceeding), also indicates that other distributing companies would probably also disclaim.

regulation only by the Commission. *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498.<sup>6</sup> These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled the Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610.

There is no question of local law here involved, at least in regard to the claims of Interstate's immediate purchasers as against the more remote purchasers. As between the immediate purchasers and more remote purchasers who resell, the only question is the reasonableness of the return enjoyed by "natural gas companies"—not a question of local law. Nor could a local law question arise

<sup>6</sup> The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b); *Colorado Interstate Co. v. Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, various state commissions have indicated an intention to assert jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text of this petition are applicable to any portion of the impounded fund allocable to these industrial sales.

if the claimants were immediate purchasers and more remote purchasers who do not resell (i.e., ultimate consumers) because that situation would come into being only when the company selling to the ultimate consumers has disclaimed and thereby eliminated the local-law question. Hence there could have been no interference with the rate regulatory jurisdiction of any state if the court below had refused to distribute the accumulated fund to Interstate's customers.<sup>7</sup>

The consequence is not only that the states have no authority over the funds impounded in this case. Unless the court below can order the sum distributed to persons other than the immediate purchasers, presumably to the ultimate consumers to whom the overcharges had apparently been passed on, there is no way in which the intermediate "natural gas companies" can be prevented from retaining an undeserved windfall. For despite the nominal preservation by the court below "of the rights, if any, of ultimate consumers or others to hold said companies to account in respect" of the

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<sup>7</sup>The court below, we believe, could properly have permitted the filing of claims in opposition to those of the immediate purchasers, and ordered the distribution of the impounded funds in accordance with the respective merits of these claims. Cf. *United States v. Morgan*, 307 U. S. 183, 197; *Inland Steel Co. v. United States*, 306 U. S. 153, 157; *Central States Coal Co. v. City of Muscatine*, 324 U. S. 138, 146 (dissenting opinion). If any complicated economic or accounting questions had arisen in connection with the reasonableness of rates charged during the impoundment period, the Commission could have provided the Court with any assistance it needed. Cf. *United States v. Morgan*, *supra*; *Atlantic Coast Line v. Florida*, 295 U. S. 301, 312-313; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 618-619.

accumulated fund,<sup>2</sup> no power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or distributing companies any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from the distributing companies. The distributing companies are without legal rights in the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4(c) of the Natural Gas Act, 15 U. S. C. 717c(c); cf. *Arizona Grocery Co. v. Alchison, Topock & Santa Fe Ry. Co.*, 284 U. S. 370, 384. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their

<sup>2</sup> It is interesting to note in this connection that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. Nor, for that matter, anything happened as the result of the reservation of such rights in the unreported proceedings in the Eighth Circuit in the *Panhandle* distribution. This is in part due to the fact that, typically, state commissions, as the Commission here, have no retroactive rate jurisdiction or reparation power.



inter-state sales of gas at wholesale. *Public Utilities Commission v. United Gas Co.*, *supra*, at 468; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498.

Thus the result of the extension of the *Central States* case is to take the excess over the fair return allowed by the Commission from one "natural gas company" and give it to another which is already earning a fair return. It effectively denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefit.

2. The *Central States* case is also distinguishable for other reasons. In the first place, the terms of the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i.e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court apparently intended, when it entered that stay, to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas or other persons to whom the Court shall find the same should be returned, as contemplated by the provi-



sions of the Natural Gas Act", and further it reserved to itself full jurisdiction to cancel or modify the order "to protect or to promote the rights and interests \* \* \* of the ultimate consumers or other parties financially interested in the impounded funds."

In the second place, in the *Central States* case, the distributing company claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period and, accordingly, it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. In the present case, however, the Commission, immediately before the issuance of the Interstate rate order and while it was suspended during the four years that it was being reviewed; investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi, and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of purchased gas which would result when and if that order was sustained. *United Gas Pipe Line Co.*, 3 F. P. C. 402,<sup>9</sup> *Memphis Nat-*

<sup>9</sup> As the result of conferences with the Commission, United Gas, on April 1, 1943, filed amendatory contracts affecting a reduction of rates for resale gas in the sum of \$2,195,287, annually, based upon its 1942 revenues. 3 F.P.C. at 403.

*ural Gas Co.*, 3 F. P. C. 566;<sup>10</sup> *Southern Natural Gas Co.*, 5 F. P. C. 427, 662 (order allowing rate schedules);<sup>11</sup> *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 363.<sup>12</sup> If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but

<sup>10</sup> The Commission, as the result of conferences with Memphis, issued an opinion dated September 21, 1943, more than five months after the Interstate order, accepting as of July 26, 1943, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about \$350,000. 3 F.P.C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate Order would be passed on to its customers. 3 F.P.C. at 570. In the court below, the company disputed the correctness of that statement. In 1946, Memphis filed new schedules increasing its rates. Various of its customers protested the increase and the Commission suspended the new rates. 5 F.P.C. 946. Memphis subsequently withdrew its proposed schedules.

<sup>11</sup> The Southern Natural order was entered on July 19, 1946, pursuant to a stipulation between the Commission and the company, and required the company to file new rate schedules which, as applied to its sales for the year ending December 31, 1945, would reduce revenues by \$1,200,000.

<sup>12</sup> The Mississippi order, entered November 9, 1945, required the company to reduce its revenue on regulable business by approximately \$950,000 as applied to the test year 1943. After judicial review and remand of the case to the Commission (163 F. 2d 433 (App. D. C.)), the company and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate investigation against the company, and Mississippi in turn accepted a rate reduction of about \$850,000, and further agreed to give effect to that portion of the Interstate rate order accruing since January 20, 1946. No express proviso was made for that portion which had accrued previously, and presumably it was to be disposed of as the courts should direct.

for the stay order. Cf. *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 359, 363.

3. If, notwithstanding the considerations set forth above, the Court is of the opinion that the *Central States* case extends to the situation here presented, then we submit that this Court should reexamine the rationale of that case and so modify it as to eliminate the injustice which presently is resulting from the impact of that decision on the disposition of funds accumulated under stay orders granted for the financial protection of "natural gas companies" which desire to challenge rate reduction orders of the Commission.

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review, here four years, must be distributed to the natural gas company's immediate purchasers, which claim their share of the fund, without regard to whether ~~these~~ claimants are natural gas companies or local distributing companies, or to whether they earned a reasonable return during the impoundment period. For that period, we submit, not only are the ultimate consumers of gas deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612), but the Natural Gas Act is perverted into a law which

"exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States Co. v. Mascalline*, 324 U. S. 138, 146, 151 (dissenting opinion)).

Moreover, a requirement that the accumulated fund must be turned over to the immediate purchasers without regard to the surrounding circumstances, offers, we submit, a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N. J.) owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co. v. Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250, 254; Vol. II, pp. 706, 723. Where affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

W. BRADFORD ROSS,  
*General Counsel,*  
*Federal Power Commission.*

JUNE 1948.



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SUPREME COURT, U. S.



No. 109

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, PETITIONER

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR THE FEDERAL POWER COMMISSION

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 109**

**FEDERAL POWER COMMISSION, PETITIONER.**

**v.**

**INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**BRIEF FOR THE FEDERAL POWER COMMISSION**

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## **OPINION BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

## **JURISDICTION**

The order of the Court of Appeals was entered on May 12, 1948 (R. 109-112). The petition for a writ of certiorari was filed on June 21, 1948, and granted on October 11, 1948 (R. 118). The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Pending judicial review of an order of the Federal Power Commission under the Natural Gas Act, directing Interstate Natural Gas Company, Incorporated, to reduce its wholesale interstate rates for natural gas, there accumulated, pursuant to a stay order issued by the court below, a sum of \$2,765,205, representing the difference between the rates prescribed by the Commission and the rates collected by Interstate under the stay order. After the Commission's order was sustained by this Court in *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682, Interstate moved in the court below for an order directing the distribution of the accumulated fund. The court below considered itself compelled by this Court's decision in *Central States Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers from Interstate, who were themselves "natural-gas companies," as defined by the Natural Gas Act, and thus subject exclusively to the jurisdiction of the Commission in respect of their wholesale sales. Their rates, in turn, during the impoundment period, had been found by the Commission to have been excessive without regard to the lower costs which would result from the Interstate reduction and, during or immediately prior to the impoundment period, had been ordered reduced to reasonable levels. The questions presented are:

(1) Whether the *Central States* case should be reexamined and disapproved. And, if not,

(2) Whether, on the facts of the instant case, the *Central States* case compels the distribution of the accumulated fund to Interstate's immediate purchasers.

#### STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 63-66.

#### STATEMENT

The Federal Power Commission (Commission) on April 27, 1943, ordered Interstate Natural Gas Company (Interstate) to reduce its rates on and after May 15, 1943, by \$1,100,345 per annum as applied to its 1941 volume of sales. 3 F. P. C. 416, 432, 434-435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F. P. C. 1017.<sup>1</sup> On June 14, 1943, Interstate filed, in the Court of Appeals for the Fifth Circuit, a petition for review of so much of the Commission's order as pertained to its rates for resale to Mississippi River Fuel Corporation (Mississippi), Southern Natural Gas Company (Southern Natural), and United Gas Pipe Line Com-

<sup>1</sup> The Commission modified its order to reduce the amount of the rate reduction by \$8,762 to \$1,091,583, and postponed the effective date to June 15, 1943.

pany (United Gas) for sale to Memphis Natural Gas Company (Memphis), which the Commission had found to be excessive in the amount of \$596,320 per year.<sup>2</sup> The petition for review was thereafter denied by the Court of Appeals, Judge Waller dissenting (*Interstate Natural Gas Co. v. Federal Power Commission*, 156 F. 2d 949), and this Court, on June 16, 1947, affirmed. 331 U. S. 682. Interstate's petition for rehearing was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October, 1947.

Ancillary to its petition for review in the Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. On June 14, 1943, the stay was granted on the condition that Interstate pay into the court's registry the monthly excess of payments under the existing rates over those required under the Commission's order (R. 1, 2). It further provided (R. 2):

The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall

By stipulation, Interstate withdrew its assignments of error in so far as they related to the remaining portion of the Commission's rate order.



find the same should be returned, as contemplated by the provisions of the Natural Gas Act.

\* \* \* \* \*

Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds.

Pursuant to this Order, Interstate deposited \$2,444,573 in the registry of the court. Some \$320,000 more, not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay (R. 43, 52, 75).

On December 18, 1947, subsequent to this Court's denial of rehearing in regard to the main review proceeding, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis, and Memphis (R. 16-19).<sup>3</sup> All four companies thereupon moved to intervene in the proceedings (R. 42-48, 49-54, 71-81, 100-103), and intervention was allowed (R. 67). United

<sup>3</sup> The sales of natural gas to United Gas involved in that portion of the Commission's Order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

Gas claimed an allocable share on behalf of Memphis to which it had resold the gas which it had purchased from Interstate (R. 100). The other three purchasers, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged, in reliance on *Central States Co. v. City of Muscatine*, 324 U. S. 138,<sup>1</sup> that the court had no choice but to distribute the fund to them. These companies, in turn, resold gas to twenty-one distributing companies, which served ultimate consumers in eight states (Georgia, Alabama, Mississippi, Louisiana, Tennessee, Arkansas, Missouri and Illinois).<sup>2</sup>

The Illinois Commerce Commission (petitioner in No. 212), the Public Service Commission of Missouri (petitioner in No. 188), the Memphis Light, Gas and Water Division of the City of Memphis, (petitioner in No. 209), and the City of Jackson, Tennessee, also intervened (R. 68-71, 92-95, 21-41, 81-87). They, together with the Commission, urged, in opposition to the claims of the purchasing companies, that the *Central States* case was not here applicable inasmuch as the

<sup>1</sup> The purchasing companies also relied on the unreported *per curiam* opinion of the Court of Appeals for the Eighth Circuit in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, ordering distribution of allocable shares to Panhandle's nondisclaiming customers. The Eighth Circuit there based its opinion on the *Central States* case.

<sup>2</sup> The details of the amount of gas sold to distributing companies, and the amount of refund to which each would be entitled if the impounded fund were passed on to them is set forth in the Record at p. 39.

claiming companies were "natural-gas companies" whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. The Commission further pointed out that voluntary rate reductions and Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess. The Commission took the position that the impounded fund belonged to, and should be distributed to, the ultimate consumers, and that notice should be given to interested persons including, among others, the state regulatory commissions and cities in which are located the ultimate consumers. This the court failed to do (R. 58).

The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipeline companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipeline companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold

said companies to account in respect thereof" (R. 105). The court, accordingly, entered an order directing that the fund be distributed to Interstate's immediate purchasers in accordance with the terms of its opinion (R. 109-112).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Court of Appeals erred:

1. In holding that the *Central States* case is here applicable.
2. In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to immediate purchasers of natural gas from Interstate.
3. In ordering the distribution of that fund to these purchasers.

#### **SUMMARY OF ARGUMENT**

In this case, the court below held that it was compelled by *Central States Co. v. City of Muscatine*, 324 U. S. 138, to distribute to the immediate purchasers from Interstate, themselves "natural-gas companies," the fund accumulated pursuant to its stay of a Commission rate reduction order. In the *Central States* case, this Court held that courts of appeals were without power to distribute such a fund to ultimate consumers where a local distributing company claimed its allocable portion on the ground that it had failed to earn a reasonable return during the impoundment period. The determination of that claim, this Court held, involved the legisla-

tive function of rate-making, solely within the competence of Iowa, the state where the local distributing company was located. We show first that the *Central States* case should be reexamined and overruled, and second, that even if *Central States* is to stand, the immediate purchasers from Interstate are not entitled to the fund, even within the confines of that case. We are constrained primarily to contend, however, that *Central States* should be overruled; for, although it is, in some respects, distinguishable, the effect of the distinctions advanced can only bring to the ultimate consumers those portions of the fund the rights in which are voluntarily disclaimed by distributing companies who purchase for resale from the respondent immediate purchasers.

## I.

A. The *Central States* case is unsound on principle. Since the fund to be distributed was accumulated as the result of a judicial stay, the court has, as an incident thereto, the power to dispose of the fund, so accumulated, in accordance with equitable principles. The fund need not be distributed solely to the immediate purchasers; all interests in the fund, including claims over which the court would have had no original jurisdiction, may be passed upon.

Of the possible claimants to such a fund, the ultimate consumers are the only group who were prejudiced by the stay and, since the criterion



governing distribution of the fund is correction of wrong caused by the stay, the ultimate consumers are equitably entitled to the fund. The "natural-gas company" whose rates were reduced received affirmative protection from the stay. The purchasers for resale were not affected by the stay; it did not disable them from invoking the usual machinery for seeking rate increases if they failed to earn a reasonable return. The stay did, however, prevent the transmission of the benefits of the Commission's order to the ultimate consumers. While the stay was in effect, no voluntary reduction in rates based on the reduced costs that would follow upon the affirmance of the rate reduction order would be made, nor could that order be used by the ultimate consumers and the regulatory commissions to attack the rates of the purchasers for resale. The equitable right of the consumers is reinforced by the fact that the primary purpose of the Natural Gas Act is to protect them against exploitation.

Approached as a problem in judicial disposition of a fund accumulated pursuant to court order, there is no question as to the reasonableness of the rates of the purchasers for resale and hence no rate-making question. This is so because as we have said, it is fair to presume that purchasers for resale were not injured by the stay. However, even if the reasonableness of its rates were a factor in determining whether a purchaser for resale might share in the distribution, that ques-

tion would not involve the legislative function of rate making. The reasonableness of the rates is only one of the factors considered in passing on the claim. The rates prescribed by, or filed with, the appropriate agency are not changed or affected and remain the legal rates. To the extent that elements of rate making are considered, the court may utilize advisory determinations of the regulatory agencies and, in the light of these determinations, it may dispose of the fund in accordance with equitable principles. Such cooperation between the courts and regulatory agencies "was devised to unravel the skein," in *United States v. Morgan*, 307 U. S. 183, and *Atlantic Coast Line Co. v. Florida*, 295 U. S. 301. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620:

B. The *Central States* case defeats the objectives of the Natural Gas Act for the period of judicial review by nullifying for that period its financial benefits to the ultimate consumers. For example, in the present case, none of the fund will reach the ultimate consumers, and the immediate purchasers, who earned a reasonable return during the impoundment period and who are in a position to retain their full share, receive a pure windfall. Prior to *Central States*, it was uniformly agreed that the ultimate consumers were entitled to the impounded fund. In contrast, subsequent to that decision, substantial numbers of immediate purchasers have asserted claims. This increase is largely due to the fact that once a purchaser for resale has received its

allocable share, it usually is in a position to keep it, for, despite this Court's express preservation of local remedies to the ultimate consumers, typically, no such remedies are available either before the regulatory commissions or the courts. Moreover, by requiring the contribution of such a windfall to the purchasers for resale, the *Central States* case encourages frivolous litigation, where, as was the situation here, there is affiliation between the "natural-gas company" whose rates have been ordered reduced and its immediate purchaser, a situation not uncommon in the natural gas industry.

C. This Court should itself overrule *Central States*. Corrective action, if any is to be had, should not be left to Congress, for the *Central States* opinion is formulated in constitutional terms of exclusive state legislative power. Moreover, questions relating to the powers of a federal court sitting as a court of equity are singularly judicial, not legislative, in nature. Congress has not affirmatively approved the decision, but, rather, has been silent. No interests, substantial or otherwise, have been established by "the accretion of time and the response of affairs" around the decision.

## II

Even if *Central States* should not be disapproved, the present case is distinguishable from that case in at least three significant respects, and

hence, even within the confines of that case, Interstate's immediate purchasers are not entitled to the fund.

A. Here, unlike the situation before this Court in *Central States*, the immediate purchasers are themselves "natural-gas companies" engaged in the transportation or sale at wholesale of natural gas in interstate commerce. These activities are subject to regulation only by the Commission, and even in the absence of Congressional action, are not subject to local regulation.

B. Here, the claims of the immediate purchasers, unlike those involved in the *Central States* case, are predicated not on the ground that their return during the impoundment period was unreasonably low, but, rather, solely on the ground that they are the immediate purchasers from Interstate. And even if the immediate purchasers had based their claim on an inadequate return, there was available to the court, in contrast to the *Central States* situation, the findings of the Commission which, immediately before the issuance of the Interstate rate order and while it was suspended during judicial review, had investigated into the reasonableness of the immediate purchasers' wholesale interstate rates. Although no effect was given to the Interstate rate order, the immediate purchasers' rates were found unreasonably high, and were substantially reduced, either voluntarily or pursuant to Commission order, to reasonable levels. Whatever legislative

function there might be involved in passing on the reasonableness of the immediate purchasers' rates has already been performed by the Commission, and hence there were available to the Court administrative findings as to the reasonableness of these rates for its use in passing on the immediate purchasers' claims.

C. In *Central States*; this Court did not consider that it was finally disposing of the fund. Here, however, there is plainly no other forum in which the claim of the immediate purchasers to the fund may be challenged. The Commission has no reparation power. The state regulatory agencies have no power to compel the immediate purchasers to disgorge that portion of the refund attributable to their wholesale interstate sales. Hence, the distribution of the fund to the immediate purchasers here is final.

D. An additional factual distinction, which may be given some weight, is the terms of the stay orders. In *Central States*, the stay provided for the filing of a bond to secure the refund to the purchasers at wholesale. Here, the stay recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court, when it granted the stay, apparently intended to distribute the fund to the ultimate consumers, barring unforeseen contingencies.



## ARGUMENT

## INTRODUCTION

This case raises the problem of the disposition of a fund which has accumulated as a result of the exercise of the equitable power of a court of appeals, under Section 19 (c) of the Natural Gas Act (Appendix, *infra*, p. 66) to stay the Commission's order pending review. Now, that judicial review has been concluded and the Commission's order sustained, the question as to the appropriate manner of distributing the fund which represents the difference between the rates charged by Interstate and the lower rates ordered by the Commission calls for decision.

In *Central States Co. v. City of Muscatine*, 324 U. S. 138, this Court denied to the court of appeals there involved the power to distribute to the ultimate consumers the fund which had accumulated pursuant to the court's stay, there being an adverse claim thereto, asserted by a local distributing company, and predicated on the ground that it had failed to earn a reasonable return during the impoundment period. As formulated by Mr. Justice Roberts writing for the majority, the issue before the Court for decision involved the fixing or adjusting of Central's rates. (324 U. S. at 143.) As so formulated, the Court commented, "the court below was right in its view that as a federal court it had no power \* \* \* to fix or adjust Central's

rates, that being a legislative function of the State of Iowa. \* \* \* This, because the court below had no power as a court of equity to fix rates, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa." (324 U. S. at 143-144.)

In the present case, the immediate purchasers from Interstate, themselves "natural-gas companies" which sell to local distributing companies for resale to ultimate consumers, claimed the fund solely on the basis of the fact that they were the immediate purchasers. The court below held, on the authority of the *Central States* case, that it was without authority to inquire into those claims, and that the only appropriate manner of distribution was to give the fund to the claiming immediate purchasers without prejudice to the rights of the ultimate consumers or others to hold them to account in respect thereof (R. 105).

In Point I, we show that inquiry into the claim of the purchasers for resale, whether local distributing companies or "natural-gas companies," indicates that the fund should be awarded to the ultimate consumer if equity is to be done and the Congressional purpose is to be realized; accordingly we urge the Court to reexamine and overrule the *Central States*' decision, so as to make an award of the fund to the ultimate consumers possible. We urge, in Point II, that, consistently with the *Central States*' decision, the

court below could have inquired into and rejected the immediate purchasers' claims, with the result that, since some local distributing companies have disclaimed and more probably would, some part of the fund would reach the ultimate consumers.

# I

## THE *Central States* CASE SHOULD BE REEXAMINED AND OVERRULED

A. A FEDERAL COURT HAS JURISDICTION TO DISTRIBUTE IMPOUNDED FUNDS TO ULTIMATE CONSUMERS, AS AGAINST THE CLAIM OF PURCHASERS FOR RESALE

1. *A federal court has equitable jurisdiction to distribute the fund.*—The fund to be distributed in the *Central States* case, as is the case of the fund here involved, was accumulated as the result of a stay order issued by a court of appeals pending judicial review of a Commission rate reduction order. In each case, the Commission had issued an order directing a "natural-gas company" to reduce its rates subject to the Commission's jurisdiction by a prescribed amount, and the "natural-gas company" sought judicial review of the Commission order, as provided in Section 19 (b) of the Natural Gas Act (Appendix, *infra*, pp. 64-65). As an incident to that review, the company also requested the court to exercise the power vested in it by Section 19 (c) of the Natural Gas Act to stay the Commission's order (Appendix, *infra*, p. 66); and thereby to assure

the company that the excess over the rates ordered by the Commission would not be dissipated in the event that the Commission's order be set aside. As a consequence of the exercise of jurisdiction to stay the Commission's order, a court of appeals also, we submit, had the jurisdiction to distribute, in accordance with equitable principles, the fund which accumulated pursuant to its stay.

At the outset, it is clear that a court of appeals sits as a court of equity in reviewing the action of the Commission. *United States v. Morgan*, 307 U. S. 183, 191; *Inland Steel Co. v. United States*, 306 U. S. 153; *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373. When, as a court of equity, it grants injunctive relief, the court has the duty "to do so upon conditions that will protect all—including the public—whose interests, the injunction may affect." *Inland Steel Co. v. United States*, *supra* at 157. As specifically here applied, this means that "in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive [the court] assumes the duty of making disposition of the fund in conformity to equitable principles." *United States v. Morgan*, *supra* at 191; *Inland Steel Co. v. United States*, *supra*.

In disposing of the fund, the court need not consider solely the claims of those persons who

are parties to the proceedings. On the contrary, the court has authority to determine all interests in the fund and order the distribution thereof to those who are equitably entitled thereto. *United States v. Morgan, supra* at 187. This broad jurisdiction stems from the fact that the fund was accumulated as an incident to the main review proceedings. *Hoffman v. McClelland*, 264 U. S. 552; *Inland Steel Co. v. United States, supra*, at 158. And in the ancillary proceedings regarding the disposition of the fund, the court has power to consider not only claims which it would have power to adjudicate in an original proceeding but also claims over which the court had no original jurisdiction. "Where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs \* \* \*." *Hoffman v. McClelland*, 264 U. S. 552, 558; see also, *Central Union Trust Co. v. Anderson County*, 268 U. S. 93; *Oklahoma v. Texas*, 258 U. S. 574, 581; *Labette County Commissioners v. Moulton*, 112 U. S. 217; *Krippendorf v. Hyde*,



110 U. S. 276, 281; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632.\*

*Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, is particularly relevant on this question. In that case, the district court, after this Court had sustained a municipal gas ordinance\* (250 U. S. 256), retained jurisdiction to require the company to make refund and restitution to consumers of all amounts collected over the legal rate while the litigation was pending. This Court there rejected as transparently unsound the contention that since the consumers were not parties to the record nor in privity with the parties, the court was without jurisdiction to distribute the money to them. 256 U. S. at 517. It further pointed out that the bond there filed by the Company "rec-

\* *Southern Pacific Co. v. Darrell-Taenzer Lumber Co.*, 245 U. S. 531, and *Adams v. Mills*, 286 U. S. 397, relied on by respondent Southern Natural (Answer in No. 109, p. 10) are clearly inapplicable here. Those cases involved reparation proceedings where the issue concerned the liability *vel non* of the utility to refund excessive rates previously collected. In such a situation, the strict rules of contractual privity are held to be controlling, and hence the utility was not permitted to evade the obligation to refund by asserting that the party seeking reparation may have passed on the excessive charges to someone else. Strict contractual privity is, however, not controlling in situations such as the instant one, where the court proceeds on equitable principles. See *Anniston Mfg. Co. v. Davis*, 301 U. S. 337; *United States v. Jefferson Electric Co.*, 291 U. S. 386, 402-403. In such a case, the court is less restricted and fettered by technical rules and formalities than in other types of actions. "It aims at the abstract justice of the case \* \* \*." *United States v. Jefferson Electric Co.*, *supra* at 403.

ognized that to ascertain what should be due to them [the ultimate consumers], to see to its collection from the company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause. To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate." 256 U. S. at 517. See, also, *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146; *In re City of Louisville*, 231 U. S. 639; *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F. 2d 481, 483 (C. C. A. 7).

2. *The ultimate consumers are equitably entitled to receive the impounded fund.*—An equity court, in distributing the fund accumulated by virtue of its stay, seeks "to correct that which has been wrongfully done by virtue of its process." *United States v. Morgan*, 307 U. S. 183, 197; *B. & O. R. Co. v. United States*, 279 U. S. 781, 786; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.* 249 U. S. 134, 146; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219; *Central States* case at 148 (dissenting opinion); cf. *First National Bank v. Flershem*, 290 U. S. 504, 520. In the light of that objective, the determination as to which among the conflicting

interests should participate in the distribution of the fund involves ascertaining who suffered a loss as a result of the court's action in granting the stay. Examination of the bases of claims of the various groups of possible claimants to the unpounded fund indicates clearly that the ultimate consumers are the only persons prejudiced because of the stay.

The "natural-gas company" whose rates the Commission has ordered reduced, far from being injured by the stay, receives affirmative protection therefrom. If it is successful in reversing the Commission's order, the stay assures it that it will receive 100% of the excess over the rates ordered by the Commission. If it does not succeed in reversing the Commission's order, it is in no worse position than if the order had not been stayed.

The purchasers for resale of the natural gas, whether local distributing companies as in the *Central States* case, or "natural-gas companies" as in the present case, suffer no monetary loss as a result of the stay. The costs of the purchased gas are included in rates charged to the ultimate consumers and so passed on to them. In addition, these companies are constitutionally entitled to charge rates which reimburse them for their costs of operation and in addition yield a fair return on their investment. Included in these costs of operation is the cost of purchased gas, which, with the Commission's rate order stayed, re-

mains unchanged during the impoundment period. If on the basis of costs so computed, the purchasers for resale fail to earn a fair return, the usual machinery for seeking an appropriate rate increase is available to them; the court's stay does not in any way disable them from invoking that machinery. Presumptively, their failure to seek such a rate increase indicates that in fact they did earn a fair return. *Central States* case at 150, 153 (dissenting opinions); cf. *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 291, 312. Moreover, even if they did not earn a fair return during the period that the Commission's order is stayed, that failure is not a consequence of the stay. It is only those consequences which resulted from the stay which the court should correct in distributing the impounded fund. To bestow upon the purchasers for resale the fund accumulated pursuant to the stay in addition to the fair return which they are entitled to seek by other means, would be to give them an unmerited windfall.

The ultimate consumers, however, do suffer a monetary loss as a result of the stay of a Commission rate reduction order. During the period

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It was for this reason that the natural gas company in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575 (which gave rise to the *Central States* case) urged initially that, as between it and the companies purchasing from it, it was entitled to the fund which had accumulated. See Brief for Natural Gas Pipeline Co., Nos. 265, 268, October Term 1941, pp. 260-264.

that the order is stayed, no voluntary reduction in rates predicated on reduced cost stemming from the rate reduction order would be made. Until the rate reduction is finally affirmed by the courts, it is uncertain whether the distributing company's costs of purchased gas will be so reduced. For that reason, neither the state regulatory agency nor the ultimate consumers themselves can, in reliance on the Commission's rate reduction order, attack the local distribution rates as unreasonably high. "A federal rate reduction order cannot be utilized before state regulatory agencies where the federal order has been stayed by a federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies." *Central States* case at 149 (dissenting opinion). Accordingly, since the court, in staying the Commission's order, prevented the transmission of these benefits to the ultimate consumers, it should, on the equitable principle of correcting that which had been wrongfully done by its process, order the distribution of the fund to the ultimate consumers.\*

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\*The fact that, absent a stay, delays, inherent in the processes of law, might have been encountered in reducing the rates of the purchasers for resale, does not affect the equitable right of the ultimate consumers to the fund where the order has been stayed. "If the processes of the law \* \* \* [were] instantaneous or adequate, the attempt at correction



This is particularly true where, as here, the ultimate consumers have no legal recourse for the recovery of any part of the impounded funds. See *infra*, pp. 39-41, 59-61.

This equitable right to the impounded fund of ultimate consumers as the only persons who suffered monetary loss by virtue of the stay, is reinforced by the fact, which this Court has recognized, that "the primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612;<sup>9</sup> see, also, *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 583; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456, 469; *Central States case*<sup>10</sup> at 146 (dissenting opinion). The distribution of the impounded fund to the ultimate consumers would be in furtherance of this objective.

3. *The judicial distribution of the impounded fund does not involve rate making.*—(a) As we have shown above, only the ultimate consumers have suffered loss as a result of the stay and have an equitable right to the impounded fund. The purchasers of natural gas for resale, whether local distributing companies or "natural-gas com-  
would not have missed the mark." *Atlantic Coast Line Co. v. Florida*, 295 U. S. 301, 312.

<sup>9</sup> Mr. Justice Jackson's separate opinion in that case contains the statement that "the whole reduction" in the natural gas company's revenues "is owing to domestic users." 320 U. S. at 659.

panies," have no equitable right to the fund. They are not restrained by the stay from seeking adjustments of their rates to yield a fair return and, hence, presumptively earned a fair return during the impoundment period. *Supra*, pp. 22-23. When the problem of distributing the impounded fund is thus properly approached, no rate-making question is raised and the equity court intrudes upon no state legislative function.

(b) Only if we assume, *arguendo*, that a purchaser for resale sustains the burden of making at least a *prima facie* showing that it had not earned a reasonable return during the impoundment period and ignore such a purchaser's failure to appeal to the appropriate regulatory agency for an increase in rates, is the reasonableness of its rates during that period a factor in determining whether it is entitled to share in the distribution. But, even then, it does not follow that the determination of that question is beyond the competence of the court. In such a proceeding, the court would be seeking to correct the wrong allegedly resulting from its stay of the Commission's order, and the question before the court would be which of the claimants were equitably entitled to share in the accumulated fund. *Supra*, pp. 19, 21-22. The question as to the reasonableness of the rates is ancillary thereto, and is one of the factors considered in passing on the claim of a claiming purchaser for resale. Moreover, the determination is made only for the purpose of

the distribution proceeding, and does not in any way affect the rates charged during the impoundment period. These rates are those prescribed by or filed with the appropriate agency and, regardless of the determination in the distribution proceeding, remain the legal rates for that period. The claimant company has received those rates, and if the fund is distributed to the ultimate consumers, will continue to retain them. It merely will not get the extra windfall which the order of the court below would give it. In these circumstances, any inquiry by a federal court as to the reasonableness of the company's past rates for the purpose of remedying the injury caused by its action cannot, we submit, be said to involve legislative prescription of rates.<sup>10</sup>

*Atlantic Coast Line Co. v. Florida*, 295 U. S. 301;

<sup>10</sup> Traditionally, the scope of the exclusively legislative function in regard to rates is restricted to the prescription of future rates. The inquiry into the reasonableness of even future rates legislatively prescribed, although limited to determine whether any constitutional or statutory rights have been violated, has been regarded as judicial in nature. See, e. g., *Los Angeles Gas Co. v. R. R. Comm'n.*, 289 U. S. 287; *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 154; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; compare *Keller v. Potomac Electric Co.*, 261 U. S. 428. The judicial nature of the inquiry is even clearer when the question of reasonableness relates to past rates. *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 499-500, and cases there cited; *Baer Bros v. Pencer & R. G. R. R. Co.*, 233 U. S. 479, 486; *L. & N. R. R. Co. v. Sloss-Shiffield Co.*, 269 U. S. 217, 234; *Arizona Grocery v. Atchison Ry.*, 281 U. S. 370.

*Inland Steel Co. v. United States*, 306 U. S. 153; *United States v. Morgan*, 307 U. S. 183; *Central States* case, 324 U. S. at 149 (dissenting opinion). In both the *Morgan* and *Atlantic Coast Line* cases, the courts themselves ordered the distribution of the fund accumulated during a period of judicial review of a rate order, although the claims there presented involved a determination as to reasonable rates during that period.

To the extent that such an adjudication involves rate making, this Court has held that the equity court could utilize administrative determinations of the proper rate for the interim period although such rates were beyond the competence of the administrative agency to prescribe. Thus, in the *Morgan* case, the fund involved had accumulated under a judicial stay in effect while the original rate reduction order issued by the Secretary of Agriculture was being reviewed and set aside by the courts for procedural defects. Any order which might subsequently be issued by the Secretary would necessarily be effective only prospectively, for there was no statutory provision for reparations. This would leave the prescribing of proper rates for the period of the impoundment beyond the competence of the Secretary. But this Court pointed out that the Secretary did have authority to find what the rate properly should have been during that period even though he could not prescribe it or give it effect by any order, and this Court held

that the district court should utilize the Secretary's determination of that question and dispose of the fund as an excess over such proper rate (307 U. S. at 198):

A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co. v. Florida*, supra, 312-313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. *Mahler v. Ego*, 264 U. S. 32; *Tod v. Waldman*, 266 U. S. 113. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.



In the *Atlantic Coast Line* case, the amount involved was the excess over previously fixed rates collected by a carrier under an order of the Interstate Commerce Commission prescribing increased rates during the period between the effective date of the order and the order of the court on review setting the increase aside for procedural defects. Subsequently, by a valid order, the increase became effective but again, as in the *Morgan* case, the administrative agency had no authority to prescribe the rate for the interim period. This Court treated the subsequent valid administrative increase in rates upon the basis of the facts prevailing during the interim period as a sufficient basis for court determination that the equities of the case required refusal of restitution (295 U. S. 316-317):

\* \* \* A complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether. The rates now recognized as just are not a fabrication of the judges. They have not been fixed by a court to take effect thereafter. They are the rates prescribed for the future by the appointed administrative agency, and that on two occasions, after scrutiny and study of injustice suffered in the past.

\* \* \* A situation so unique is a summons to a court of equity to mould its plas-

tic remedies in adaptation to the instant need.

\* \* \* We think the claim for restitution should have been rejected altogether. In thus holding we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect of past transactions. Cf. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389; *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, 569. None the less, as the court below conceded, it was entitled to great respect, representing, as it did, the opinion of a body of experts upon matters within the range of their special knowledge and experience. *Illinois Central R. Co. v. Interstate Commerce Comm'n*, 206 U. S. 441, 454; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 665.

In the present case, the order below distributing the impounded fund among the purchasers for resale would give them an excessive return for the interim period exactly as would a retroactive rate increase for that period. Such an excessive return would be analogous to the awards which were denied in the *Morgan* and *Atlantic Coast Line* cases. It is therefore appropriate for the court which has issued the stay to utilize administrative determinations, if necessary, and on the basis of

those determinations, to dispose of the fund in accordance with equitable principles.<sup>11</sup> Where,

<sup>11</sup> This requires rejection here, as in the *Atlantic Coast Line* case, of contentions based on *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, denying to the federal judiciary the power to take upon itself the function of a rate-making body charged with legislative duties. As this Court pointed out in the *Atlantic Coast Line* case (295 U. S. 315-316) : "The claimants refer to cases in which this court has denied the power of the federal judiciary to take upon itself the functions of a rate-making body, charged with legislative duties. None of the cases cited controls the case at hand. A typical illustration is *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264. Rates prescribed by a state commission for the furnishing of gas were found by a federal court to be below the line of compensation. In the face of that finding the decree refused relief unless the complainant would consent to abide by a new schedule established by the court itself. Upon appeal to this court the condition was annulled. We gave explicit recognition to the power of a court of equity to subject an equitable remedy to equitable terms. We held, however, that full protection could be accorded to seller and consumer if the regulatory Commission were permitted to discharge its proper function of prescribing a just schedule after the unlawful one had fallen. In the circumstances there was no occasion for the court to draw upon its extraordinary equity powers to attach any condition to its decree, and the condition which it did attach was an unwarranted intrusion upon the powers of the Commission." 290 U. S. at p. 273."

*Newton v. Consolidated Gas Co.*, 258 U. S. 165, on which respondents also rely in this phase of the case (Br. for Interstate in opposition, pp. 10, 11, 16; Answer of Southern Natural in No. 109, p. 12; Response of Memphis, p. 7) is similarly inapplicable. The *Newton* case held that the decree of a district court enjoining a rate as confiscatory on condition that the utility should impound the rate collected in excess thereof, could not direct disposition of the impounded fund "in accordance with any subsequently approved rate." The court, this Court held, "should not have attempted, in effect, to sub-

as in this case, there is an unchallenged administrative determination already made (see *infra*, pp. 53-57), or filed rates are properly accorded the same effect as administratively prescribed rates (see *infra*, pp. 39-41), it may be unnecessary for the court to await a further administrative determination.<sup>12</sup>

It was such cooperation between the courts and regulatory agencies "which was devised to unravel the skein" in the *Morgan and Atlantic Coast Line* cases. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620; *American Tank Car Corp. v. Terminal Co.*, 308 U. S. 422; *Inland Steel Co. v. United States*, *supra*; *Graf v. Hope Building Corp.*, 254 N. Y. 1, 7 (Cardozo, C. J. dissenting). There, "the creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have escaped the imprisonment of reason and fairness within mechanical concepts of the common law." *Addison v. Holly Hill Co.*, *supra*, at 620. Such a solution of the problem presented by this case

ject the Company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing" (258 U. S. at 177). Thus the nub of the Court's holding was that the condition imposed by the district court as a condition of the injunction involved an abuse of discretion.

<sup>12</sup> In the court below, the Commission and the Illinois Commerce Commission offered their assistance to the court in investigating into the immediate purchasers' claims. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 618-619.

would avoid repetition of the "mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice."

*Morgan* case at 191. "Court and agency are the means adopted to attain the prescribed end \* \* \* \* \* neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." • *Morgan* case at 191.

#### B. THE DOCTRINE OF THE CENTRAL STATES CASE DEFEATS THE OBJECTIVES OF THE NATURAL GAS ACT FOR THE PERIOD OF JUDICIAL REVIEW.

Under the interpretation put upon the *Central States* case by the Court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review (four years in the present case) must be distributed to the "natural-gas company's" immediate purchasers, which claim their share of the fund. For that period, we submit, the Natural Gas Act would be nullified so far as financial benefits to ultimate consumers are concerned. Not only would the ultimate consumers be deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690; H. Rep.



No. 709, 75th Cong., 1st. sess., p. 2), but the Natural Gas Act would be perverted into a law which "exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States* case at 146, 151 (dissenting opinion)).

1. *The doctrine of the Central States case discriminates against ultimate consumers.*—The instant case illustrates graphically how distribution of the impounded fund to the immediate purchasers frustrates the purposes of the Natural Gas Act. As we show, *infra*, pp. 53-57, the immediate purchasers here had earned a reasonable return during the impoundment period. Moreover, once the fund is distributed to them, no one is in a position to compel them to disgorge any portion thereof. *Infra*, pp. 59-61. In these circumstances, if the fund is distributed to the immediate purchasers, they will receive the entire fund of nearly \$3,000,000 which was accumulated during the four years that the rate reduction was stayed, and no part of it will reach the ultimate consumers for whose benefit the reduction had been ordered. Thus, the ultimate consumers are deprived of any benefit from the rate reduction for that period and *pro tanto* denied the protection from exploitation which the Natural Gas Act was intended to provide.

This is not an isolated example of the perversion of the Natural Gas Act caused by the

*Central States* case. Prior to the *Central States* decision, it was almost uniformly agreed that the ultimate consumers of the gas were entitled to the impounded fund. That was the reason why all the immediate purchasers, except the petitioner in the *Central States* case, disclaimed their allocable share in 99½% of a total fund of about 6½ million dollars in favor of the ultimate consumers. "Most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them." *Natural Gas Pipeline Co. v. Federal Power Commission*, 134 F. 2d 263, 265 (C. C. A. 7).<sup>13</sup> That was the reason which influenced the courts of appeal in 1942 in *Panhandle Eastern Pipeline Co. v. Federal Power Commission* (No. 296, October Term 1944, R. XVI, 7182);<sup>14</sup> in *Colorado Interstate Co. v. Federal*

<sup>13</sup> When the United Gas costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which, in turn, passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission v. Interstate Natural Gas Co., Inc., et al.*, F. P. C. Docket Nos. G-149 and G-132, Order of June 26, 1944.

<sup>14</sup> The Panhandle order required payment of the fund to the custodian "to be held by him for the benefit of the ultimate consumers or of petitioners as in this litigation may be determined entitled thereto." (R. XVI, 7182). See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 154 F. 2d 909 (C. C. A. 8), certiorari denied, 329 U. S. 761.

*Power Commission* (No. 379, October Term 1944, R. I, 118); in *Colorado-Wyoming Gas Co. v. Federal Power Commission* (No. 575, October Term 1944, R. I, 22); and the court of appeals, in the present case, in 1943 (R. 2), in its stay of the Commission's rate reduction order, specifically first to name the ultimate consumers of gas as the persons equitably entitled to share in the fund about to be accumulated.

Since the *Central States* decision, the percentage of claiming immediate purchasers has increased. In that case, only one immediate purchaser claimed its allocable share of  $\frac{1}{2}\%$  of the fund. In the refund stemming out of *Cities Service Gas Co. v. Federal Power Commission*, 155 F. 2d 694 (C. C. A. 10), certiorari denied, 329 U. S. 773, 16 of the 44 companies claimed all or a portion of their allocable share, or about 4% of the \$25,000,000 fund involved.<sup>15</sup> In the refund proceeding following *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 328 U. S. 635, 23 out of a total of 56 companies claimed their allocable share, about 20% of the \$24,000,000 fund there accumulated. In the instant case, the *Central States* case is being exploited to the utmost. The immediate purchasers are claiming the entire fund. The claim now asserted by Southern Natural contrasts sharply with its voluntary pass-

<sup>15</sup> Over 80% of the fund in the *Cities Service* refund was allocable to the purchases of one distributing company.

ing on of the United Gas reduction in 1943, at a time when the order here involved was already stayed. *Infra*, p. 54.

The increase in the percentage of claimants is in large measure due to the fact that the purchaser for resale usually is in a position to keep the portion of the fund distributed to it. Although in the *Central States* case, this Court required that the way be left open for the ultimate consumers to utilize the remedies, if any, provided by local law, no such proceeding has been brought. We are informed that in the *Pan-handle* case, where the court of appeals, in distributing allocable shares of 23 claiming immediate purchasers, required these distributors to undertake to satisfy any judgment obtained in such a proceeding, only one suit has to date been brought by the purchasers' customers against it. Only one such suit appears to have been brought as the result of the *Cities Service* refund proceeding.

The reason for the absence of further action by the ultimate consumers is that typically, as in the present case (see *infra*, pp. 59-61), no remedy is available. The impounded funds, if paid to the immediate purchasers, cannot be reached as an element in fixing future rates, for they fall in the category of additional past profits (as a retroactive reduction in the cost of gas purchased) which may not be considered in fixing future rates. *Knoxville v. Knoxville Water Co.*, 212 U.

S. 1, 14; *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395; *Board of Public Utility Commissioners v. New York Tel. Co.*, 271 U. S. 23, 32; *Los Angeles Gas Co. v. Railroad Commission*, 289 U. S. 287, 313.

Nor in most instances could the fund be reached by way of a reparation proceeding either before the regulatory agency or in the courts. As to the regulatory agencies, they are typically without reparation power. See, *e. g.*, *T. R. Miller Co. v. Louisville & Nashville R. Co.*, 207 Ala. 253; *City of Atlanta v. Atlanta Gas-Light Co.*, 149 Ga. 405; *Texas & Pac. R. Co. v. Railroad Commission*, 137 La. 1059; *State ex rel. Railroad v. Public Service Commission*, 303 Mo. 212, 218; *Re Arkansas Power & Light Co.*, 46 P. U. R. (N. S.) 226 (Ark. Com.); cf. *Dunlap Lumber Co. v. Nashville etc. R. Co.*, 129 Tenn. (2 Thomp.) 163. Even where they do have reparation power, regulatory agencies are unable to award reparation where the rates attacked as unreasonable have been prescribed by them in the exercise of their quasi-legislative function. *State ex rel. Boynton v. Public Service Commission*, 135 Kan. 491; *Northern Pac. Ry. Co. v. Dept. of Public Works*, 136 Wash. 389; cf. *Arizona Grocery Co. v. Atchison Ry.*, 284 U. S. 370, 389. Where a common law reparation proceeding is instituted in the courts,<sup>16</sup>

<sup>16</sup> In several states, the courts have held that the common law right to sue for reparation was abolished by the change to commission supervision. See, *e. g.*, *Graham Ice Co. v.*



the courts are similarly held to be bound by an administratively prescribed rate and barred from investigating into its reasonableness. *Boydton v. Public Service Commission, supra*. And in many states, the bar to judicial inquiry into the reasonableness of the rate attacked is extended to the situation where the regulatory agency has not affirmatively prescribed the attacked rate but merely accepted it for filing whereby, it is held, the rate becomes a "commission rate" in contradistinction to a "carrier rate." *T. R. Miller Mill Co. v. Louisville & Nashville R. Co.*, 207 Ala. 253; *E. L. Young Heading Co. v. Payne*, 127 Miss. 48; *Suburban Water C<sup>o</sup>. v. Borough of Oakmont*, 268 Pa. 243; *Mathieson Alkali Works v. Norfolk & W. Ry.*, 147 Va. 426; *Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission*, 3 S. W. 2d 489 (Tex. Civ. App.); cf. *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. 2d 443, 446 (C. C. A. 5) (Hutcheson, J., concurring). The bar to judicial inquiry which is present in jurisdictions in which the regulatory agency has no reparation power leaves ultimate consumers wholly without remedy. *Purcell v. New York Central*

*Chicago, M. & St. P. Ry. Co.*, 153 Wis. 145; *Gurhey Heater Mfg. Co. v. New York, N. H. & H. Ry. Co.*, 264 Mass. 427; *Crook v. Baltimore & Ohio Rd. Co.*, 32 Ohio App. 263; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 212 Cal. 370; *Woodrich v. Northern Pac. Co.*, 71 F. 2d 732 (C. C. A. 8); cf. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 264 U. S. 426. See, also, Note, *The Shipper's Right to Recover for Unreasonable Railroad Rates*, 21 Iowa L.-Rev. 751, 758.

*R. R. Co.*, 268 N. Y. 161; *Utah-Idaho Cent. Ry. Co. v. Public Utilities Commission*, 64 Utah 54; cf. *Charleston Apartments Corp. v. Appalachian Electric Power Co.*, 118 W. Va. 694; Hardman, *The Finality of the Filed Rate in West Virginia*, 49 W. Va. L. Q. 143, 150 *et seq.*

2. *The doctrine of the Central States case encourages frivolous litigation.*—In addition, a requirement that the accumulated fund must be turned over to the immediate purchasers, offers, we submit, a powerful incentive not only to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds, but to prolong the litigation as much as possible where, as here, the “natural-gas company,” whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system. In the present case, for example, Interstate was affiliated with Mississippi, when the petition for review was filed in the court of appeals. The Standard Oil Company (N. J.) owned 22.5% of Mississippi’s stock as well as 53.97% of Interstate’s stock, and Mr. Frank H. Lerch, Jr., was president of both companies. See *Interstate Natural Gas Co. v. Federal Power Commission*; No. 733, October Term, 1946, R. I., 241, 242, 245, 247, 250, 254; 41, 706, 723.

Such affiliation is not uncommon in the natural gas industry. The Commission recently had occasion to discuss such affiliation in another connection and it there pointed out (*Re Michigan*—

*Wisconsin Pipe Line Co.*, 67 PUR (NS) 427, 458, fn. 18):

\* \* \* the Peoples Gas Light & Coke Company which serves Chicago, Illinois, and controls Chicago District Pipeline Company, its immediate supplier, and has a substantial interest in Natural Gas Pipeline Company of America and Texoma Natural Gas Company. United Gas Corporation controls United Gas Pipe Line Company and Union Producing Company, the latter supplying in part the requirements of United Gas Pipe Line Company which company in turn supplies gas to United Gas Corporation. Lone Star Gas Company which furnishes natural gas to many communities in Texas and Oklahoma and operates its own extensive transmission system receives a large portion of its gas supply from Lone Star Producing Company. Cities Service Gas Company, which operates an extensive pipe-line network, is the source of supply to its affiliated distribution companies, Kansas City Gas Company, Wyandotte County Gas Company and Gas Service Company. Southern California Gas Company and Southern Counties Gas Company which distribute gas in a large area of southern California, operate numerous pipe lines extending to producing fields and also purchase a considerable portion of their gas supply in their distribution territory from their parent company, Pacific Lighting Corporation, which transports such gas from the gas producer

ing fields of California. Southern Natural Gas Company which operates an extensive transmission system is the sole source of gas supply to a number of affiliated distributing companies in Mississippi and Alabama. In the Appalachian area the common practice is to have production, transmission, and distribution operations integrated through common financial control as in the case of Columbia Gas & Electric System, Consolidated Natural Gas Company system, Standard Gas & Electric Company system and National Fuel Gas Company system.<sup>17</sup>

Where affiliation is present, as it was in the present case between Interstate and Mississippi when the case was still before the Commission, a requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

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<sup>17</sup> This enumeration is not exhaustive. Examination of the 1946 annual reports filed with the Commission by "natural-gas companies" subject to its jurisdiction reveals several additional instances of affiliation between local distributing companies and the "natural-gas companies" which supply them with gas. For example, Southern Natural, one of the immediate purchasers here involved is a subsidiary of Federal Water and Gas Corporation which also owns Alabama Gas Co., Birmingham Gas Company, and Mississippi Gas Company, local distributing companies in Mississippi and Alabama, supplied by Southern Natural. United Gas, another

C. THIS COURT SHOULD OVERRULE THE *CENTRAL STATES CASE*

Since, as we have shown, the *Central States* decision is unsound, that case should be overruled. "The Court bows to the lesson of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Colorado Oil & Gas Co.*, 285 U. S. 393, 407-408 (Brandeis J. dissenting).

Inasmuch as the holding in the *Central States* case was formulated in terms of the division of powers between state and federal governments as well as the separation of the judicial from the of the immediate purchasers here as a subsidiary of the Electric Power & Light Corporation holding company system, which also includes The Louisiana Power & Light Company, United Gas Corporation, New Orleans Public Service, Inc., and Mississippi Power & Light Company, distributors of natural gas in Louisiana, Mississippi, and Texas. Hope Natural Gas Company, a "natural gas company," is a subsidiary of Consolidated Natural Gas Company, which also controls The East Ohio Gas Company and The River Gas Company. Companies engaged in the local distribution of gas in Ohio. Cincinnati Gas & Electric Company, a "natural-gas company," owns 95.4% of the stock of Union Light and Power Company, a local distributing company in Kentucky. Public Service Company of Colorado, a local distributing company, is the parent of Colorado-Wyoming Gas Company, a "natural-gas company." North Penn Gas Company, a "natural-gas company," is a subsidiary of Pennsylvania Gas and Electric Corporation, which also owns 100% of the stock in Allegheny Gas Company, Alum Rock Gas Company, and Dempseytown Gas Company, local distributing companies in New York and Pennsylvania.



legislative power, i. e., that a federal court has no power to fix or adjust the rates of a local distributing company, "that being a legislative function of the State of Iowa," there is serious question whether the correction could be undertaken by legislative action. The language used by the Court, denying the power "at least in the absence of federal legislation purporting to confer such power" (324 U. S. at 143, emphasis supplied), certainly carried with it no suggestion that the validity of corrective legislation would be indubitable. This Court alone, under our system of Government, is plainly empowered to correct its former error, if such it was. *Burnet v. Colorado Oil & Gas Co.*, *supra*, at 407, and cases there cited; *Murdock v. Pennsylvania*, 319 U. S. 105, compare the situation under the English system where the Parliament is free to correct any judicial error (*Burnet v. Colorado Oil & Gas Co.*, *supra*, at 410; cf. *Helvering v. Hallock*, 309 U. S. 106, 121-122).

Even if the *Central States* case could be corrected by legislative action, this Court is not thereby debarred from itself undertaking correction. (*Burnet v. Colorado Oil & Gas Co.*, *supra* at 406, fn. 1; *Helvering v. Hallock*, 309 U. S. 106), particularly where, as here, the principle involved, relating to the powers of a federal court sitting as a court of equity, is singularly a judicial and not a legislative doctrine and hence peculiarly

for this Court to correct. Cf. *Girouard v. United States*, 328 U. S. 61. Moreover, there has been no intervening action of Congress affirmatively indicating approval of the *Central States* decision to prevent judicial correction thereof. No amendments to the Natural Gas Act dealing with this situation have been proposed.<sup>18</sup> Unlike the situation presented in *United States v. South Buffalo R. Co.*, 333 U. S. 771, Congress has been silent as to the question here involved. "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." *Helvering v. Hallock*, 309 U. S. 106, 119; *Girouard v. United States*, 328 U. S. 61, 69; *Cleveland v. United States*, 329 U. S. 14, 22-23 (Rutledge, J., concurring).<sup>19</sup> Nor have substantial interests established themselves "by the accretion of time and the response of affairs" around the *Central States* decision. *Helvering v. Hallock*, *supra* at 119.

<sup>18</sup> Doubts as to the power of Congress to act have played a part in the failure of the Commission to seek legislative relief.

<sup>19</sup> \* \* \* There are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see *Girouard v. United States*, *supra*, at 69, as they ought to do when experience has confirmed or demonstrated the errors' existence."

The *Central States* decision comes into play only when a rate reduction order has been stayed and at the present, no Commission rate reduction order is being stayed. In the present case, the stay, when originally entered, contemplated that the ultimate consumers would primarily be entitled to the fund (*supra*, p. 5), and the record does not disclose that the immediate purchasers had taken any action in reliance on the *Central States* case during the period that the Commission's order was being reviewed. Hence, setting *Central States* aside would result only in disappointment, not in financial loss. Even if one of the immediate purchasers here had taken such action, the interest arising as a result thereof would, we submit, not be of sufficient substance to warrant retaining the doctrine of that case.<sup>20</sup>

<sup>20</sup> Experience in making distribution to ultimate consumers where the purchasers for resale have disclaimed, indicates that the administrative problem of distributing the fund to the ultimate consumers is not unduly burdensome, and, despite the fact that ultimate consumers die or move without leaving a forwarding address, distribution of more than 90% of the fund is typically made. Moreover, with the acquisition of experience in such matters, the distribution does not consume an unreasonable period of time. In the Cities Service refund, the most recent in point of time, most of the fund of more than \$23,000,000 was distributed to over 700,000 customers in less than a year. In regard to the procedure adopted in making this distribution, the Master appointed by the court of appeals stated in response to an inquiry:

"I was appointed as Master on July 3, 1947. My Report, with proposed Plan of Distribution and Refund, was filed with the Court on August 4, 1947. Notice was thereupon given by mail and by publication to all parties concerned that

THE PRESENT CASE IS DISTINGUISHABLE FROM THE  
*Central States* CASE

We have urged in Point I that the *Central States* case should be reexamined and overruled. We have pressed this point in this case only after long and careful deliberation. Our decision to urge that *Central States* should not be followed was reached because in no other way can a distribution to the ultimate consumers be assured.

a hearing to consider the proposed Plan, etc., would be held at Kansas City, Kansas, on August 19, 1947. At that time the Report was approved and the Plan of Distribution and Refund as submitted was approved, adopted and incorporated in the Order of the Court of August 19, 1947. Contracts with the distributors involved and with Remington Rand, Inc., for the preparation of lists of eligible customers and the preparation of refund checks, as well as for all supplies necessary in the refunding operation, were promptly consummated. In the meantime, closing agreements and tax clearances with the Internal Revenue Department and the Revenue Departments of the states of Kansas, Oklahoma, and Missouri were secured, relieving the distributors disclaiming an interest in the fund and agreeing to distribution, of any possible tax liability thereon as a result of the distribution, the closing agreement on behalf of the federal government covering all of the companies involved and making application therefor, being finally approved by the Secretary of the Treasury on November 24, 1947. Lists of eligible customers from the various distributors were received during October and November, and the first refund checks were issued on December 4. The issuance continued and was completed on June 1, 1948. In the meantime, and as the 90-day validity period of the checks previously issued expired, appropriate notices to gas customers were published in the various towns and communities advising of the 90-day

In this Point, we urge that the *Central States* case is distinguishable from the present case, and that, even if not overruled, it should not be held to be controlling here so as to require the distribution of the fund to the immediate purchasers. Should the Court adopt this approach, and hold that the impounded fund need not be distributed to the immediate purchasers, a substantial portion of the fund clearly will reach the ultimate consumers, even within the confines of the *Central States* case.<sup>21</sup> But what the ultimate consumers

period within which to make claims where refund checks had not been received or had been received and lost or destroyed and not cashed within the validity period, etc. Processing of claims concerning refund checks was carried out from the time of the first issuance of checks, enabling persons who had an interest therein by reason of the death of the original customer to receive reasonably prompt payment of the refund. Processing of claims filed as a result of the published notices was carried on at the same time, every effort being made to issue final checks shortly after the expiration of the 90-day claim period. The only communities remaining in which final checks are to be issued where the claim period has not expired are Kansas City, Kansas, Merriam, Kansas, Kansas City, Mo., Independence, Mo., Arkansas City, Kansas, Joplin, Mo., and what is known as Joplin Rural Main Line Customers, being customers scattered around Joplin, Mo., and served by the main pipe line system. These claims are being processed at the present time, and it is hoped and anticipated that all of them can be cleared up before the first of the year."

<sup>21</sup> The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, whose allocable share of the fund is at least \$24,466 (R. 30), voluntarily filed a disclaimer of its allocable share (R. 86-87). The Laclede Gas Light Company, which also includes the merged St. Louis County Gas Company and the Missouri Natural



will receive will only be by grace of the distributing companies. For that reason, our contention that *Central States* should be overruled must be our primary one.

A. THE CLAIMS OF THE IMMEDIATE PURCHASERS  
HERE DO NOT RAISE ANY QUESTIONS DETERMINABLE  
ONLY BY A STATE AGENCY

In the *Central States* case, the immediate purchaser claiming its allocable share of the fund was a local distributing company, whose rates were subject to local regulation, and its claim fundamentally was based on the alleged inadequacy of its rates during the impoundment period. This Court in the *Central States* case, treated that question as being determinable only by a state agency. In this case, the immediate purchasers are claiming the fund as a matter of right, and not because their return during the impounding period was unreasonably low. But even if the immediate purchasers did assert that their rates were unreasonably low, the issue would not be one which a state agency could determine. Here, the

Gas Company, would also disclaim, in favor of their ultimate consumers, their shares totalling nearly \$400,000 (R. 30, 93-94). The Illinois Power Company and Union Electric Power Company have also stated their intention to disclaim all interest in about \$60,000 (R. 30) of the fund (Pet. in No. 212, p. 13, fn. 4). Experience in other similar distribution proceedings, where the percentage of disclaimers, although decreasing, has until this case usually been very high, also indicates that other distributing companies would probably also disclaim.

immediate purchasers are not local distributing companies but rather are themselves "natural-gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce. These activities, unlike those involved in the *Central States* cases are subject to regulation only by the Commission.<sup>22</sup> *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498. These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled the Congress to enact the Natural Gas Act in 1938. As this Court noted in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S.

<sup>22</sup> The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1 (b) of the Natural Gas Act, 15 U. S. C. 717 (b); *Colorado Interstate Co. v. Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, the Illinois Commerce Commission (petitioner in No. 212) and the Public Service Commission of Missouri (petitioner in No. 188) have initiated proceedings looking toward the assertion of jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text are applicable to any portion of the impounded fund allocable to these industrial sales.

482, 690, the "basic purpose" of Congress in passing the Natural Gas Act was to "occupy this field in which [this] Court had held that the States may not act." See H. Rep. No. 709, 45th Cong., 1st sess., p. 2; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610. In these circumstances, the assertion of a claim by Interstate's immediate purchasers raises questions not determinable by a state agency, and an important if not controlling factor in the *Central States* case is absent.

B. THE CLAIMS OF THE IMMEDIATE PURCHASERS DO NOT INVOLVE RATE MAKING.

In the *Central States* case, the determination of the distributing company's claim that its rate of return during the impoundment period was unreasonably low, was held to involve the legislative function of rate making. In the present case, the claim of immediate purchasers is not so predicated; instead they assert that they are entitled to the portion of fund allocable to their purchasers solely on the ground that they are the immediate purchasers from Interstate (R. 42-46, 49-53, 65, 71-75, 100). These claims so formulated obviously do not depend on the level of their rates for resale of the gas or the return produced thereby, and hence do not involve any issue as to the reasonableness of rates during the impoundment period. Therefore, no question involving the legislative function of rate making is here presented.

Moreover, even if the immediate purchasers had based their claim on the alleged inadequacy of their return during the impoundment period, the court below would not have been required itself to investigate the validity of that claim, but instead could have utilized the findings of the Commission, which, immediately before the issuance of the Interstate rate order and while it was suspended during the four years pending judicial review, investigated into the reasonableness of the wholesale interstate rates charged by the immediate purchasers. In so investigating the immediate purchasers' rates with respect to the period before the affirmance of the Interstate rate order, the Commission gave no effect to the reduction in the cost of purchased gas to each of the companies involved which would result when and if that order was sustained. Yet, in each case, as set out below, the immediate purchasers' rates were reduced to reasonable levels either voluntarily or pursuant to order of the Commission.

(1) *Southern Natural*: Southern Natural's rates were adjusted downward to reasonable levels four times during the impoundment period. On June 22, 1943, a few days after its denial of rehearing in the Interstate proceeding, the Commission instituted an investigation into the reasonableness of Southern Natural's rates and charges for the transportation and sale of natural gas subject to its jurisdiction. 3 F. P. C.

1023. While that investigation was pending, Southern Natural, on December 17, 1943, reduced its rates to its customer companies by \$175,431 annually, in order to pass on the benefits of the reduction in its costs of purchased gas resulting from the reduction in the rates of another supplier; United Gas. See Commission Order of January 18, 1944. On October 30, 1944, Southern Natural voluntarily reduced rates for "domestic gas to distributing companies for resale by \$634,900 annually."<sup>23</sup> See Commission Order of November 28, 1944 (accepting these schedules and noting that all but two of the distributing companies involved intended to pass the reduction on to its customers). Southern Natural's rates were further adjusted on February 15, 1945, by reducing rates for gas resold to Mississippi Power & Light Company's domestic consumers by \$14,183, and increasing rates for gas resold to its industrial customers by \$6,897. See Commission's order of March 14, 1945. On March 30, 1946, the Commission, as a consequence of its investigation, accepted a stipulation agreed to by Southern Natural, and ordered the Company further to reduce its rates by \$1,211,946 per annum as applied to 1944 experience. 5 F. P. C. 427. This reduction did not reflect the further reduction in costs (\$146,803 annually) involved in the Interstate proceeding. 5 F. P. C. 662.

<sup>23</sup> Southern Natural simultaneously increased rates for industrial gas by \$318,690.



Thus, shortly after the Interstate order was stayed, twice more, at intervals thereafter, and finally shortly before the stay terminated, Southern Natural's rates were reduced. Of these four reductions, three were by substantial amounts. Clearly, therefore, Southern Natural could not claim any portion of the Interstate impound on the ground that it had not earned a reasonable return during the impoundment period.

(2) *Mississippi*: The Commission on April 6, 1943, prior to its order against Interstate, instituted an investigation into Mississippi's rates and charges subject to its jurisdiction. 3 F. P. C. 972. After investigation and hearing, the Commission on November 9, 1945, directed Mississippi to reduce its wholesale interstate rates by \$945,613 per annum as applied to its 1943 volume of sales. 4 F. P. C. 340. This reduction did not reflect the reduction in cost of purchased gas which would result from the Interstate rate reduction. As to that, the Commission commented (4 F. P. C. at 359):

The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by \$401,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the

court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. \* \* \*

Mississippi sought review of the Commission's order in the Court of Appeals for the District of Columbia. That court, while it sustained the reduction for the most part, remanded the case to the Commission because of insufficient findings with respect to the allocation of certain costs.

*Mississippi River Fuel Co. v. Federal Power Commission*, 163 F. 2d 433. Upon remand, Mississippi and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate proceeding against the company. Mississippi in turn was to reduce its rates by about \$850,000 and, in addition, to pass on that portion of the reduction in costs stemming from the Interstate rate order which accrued since January 20, 1946, the date on which the Commission had originally ordered Mississippi to place reduced rates in effect. In this case, the immediate purchaser, Mississippi, clearly earned

\* If these costs were allocated entirely to regulable business and so reduced the excess earnings on that business by that amount, Mississippi's rates thereon would still have exceeded just and reasonable levels by at least \$800,000 per annum.

2 No express provision was made for that portion of the reductions which accrued prior to January 20, 1946 and presumably it was to be disposed of as the courts should direct.

a reasonable return during the impoundment period, and, in addition, the Commission had explicitly found that the Interstate impound would be "an unearned windfall," i. e., in excess of a reasonable rate of return.

(3) *Memphis*: The Commission, as the result of conferences with Memphis, accepted as of July 26, 1943, only two months after the Interstate order, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about \$350,000. 3 F. P. C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate order would be passed on to its customers. 3 F. P. C. at 570. In 1946, Memphis filed new schedules increasing its rates by \$240,000, for the stated purpose of raising its rate of return to 6½%. F. P. O. Docket No. G-822. Various of its customers protested the increase and the Commission suspended the new rates pending a public hearing. 5 F. P. C. 946. Memphis, at its request, was subsequently permitted to withdraw its proposed schedules. Order of February 4, 1947. F. P. C. Docket No. G-822. These circumstances indicate that, presumptively, Memphis' rate of return during the impoundment period was reasonable.

\* In the court below, the company disputed the correctness of that statement.

Since United Gas, the fourth immediate purchaser here involved, intends to pass on its share of the fund to Memphis,

Thus, the determination of the claims of the immediate purchasers here would not, as it might in the *Central States* case, have involved the passing on the adequacy of their return during the impoundment period. Even if there had been a legislative function involved in passing on the reasonableness of the immediate purchasers' rates during that period, it would already have been performed by the Commission, the agency empowered to make these determinations. There, accordingly, were already available findings as to the reasonableness of the immediate purchasers' rates for the court's use in passing on their claims.<sup>28</sup> These findings indicated that the immediate purchasers earned a reasonable return during the impoundment period and, hence, that the formula used by the Commission in determining the rates of these purchasing companies necessarily would have resulted in additional reductions in their rates but for the stay in the *Interstate* case. Cf. *Mississippi River Fuel Corp.*, 4 F. 1<sup>st</sup> C. 340, 359, 363.

for whose account the purchases were made (*supra*, pp. 5-6), and not to retain any portion thereof to itself, its experience during the impoundment period is immaterial.

<sup>28</sup>In the absence of Commission findings as to the reasonableness of the immediate purchasers' rates during the impoundment period, the court could have held the fund pending findings by the Commission as to the reasonableness of these rates. See *supra*, pp. 28-33.

C. NO OTHER METHOD OF RESISTING THE CLAIM OF THE IMMEDIATE PURCHASERS IS AVAILABLE

In the *Central States* case, the Court apparently thought that there might be a method provided under the laws of the State of Iowa whereby the rights of the ultimate consumers to the fund *vis-a-vis* the local distributing company could be adjudicated (324 U. S. at 145, 146) and, hence, that its disposition of the cause did not, necessarily, finally determine any claims to the fund. In the present case, the court below also indicated that it did not intend its disposition of the fund to be final, and provided for the preservation "of the rights, if any, of ultimate consumers or others to hold said companies to account in respect" of the accumulated fund.

But the disposition of the fund by the court below here is final. The rights which the court below preserved to the ultimate consumers are nominal only, for in this case, there clearly is no method available whereby the rights of the immediate purchasers to the fund can be attacked.<sup>29</sup> No power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or to distributing companies any portion of the fund to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from

<sup>29</sup> It should be noted that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. See *supra*, p. 38.



the distributing companies. The distributing companies are without legal rights in the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4 (c) of the Natural Gas Act, 15 U. S. C. 717c (c); cf. *Arizona Grocery Co. v. Atchison Ry.*, 284 U. S. 370. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their interstate sales of gas at wholesale. *Public Utilities Commission v. United Gas Co.*, *supra*, at 468; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission v. Atleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498. In these circumstances, the consequence in the present case is that unless the court below has power to order the fund distributed to persons other than the immediate purchasers, there is no way in which these immediate purchasers can be prevented from retaining the fund distributed to them, which, in

light of the facts in this case, is clearly an undeserved windfall.

#### D. THE TERMS OF THE STAY ORDERS INVOLVED ARE DIFFERENT

In the *Central States* case, the Court apparently regarded the terms of the stay order as one of the important background factors to be considered. There, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i. e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund, and the court, when it entered the stay, apparently intended to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act," and further it reserved to itself full jurisdiction to cancel or modify the order, "to protect or to promote the rights and interests \* \* \* of the ultimate consumers or other parties financially interested in the impounded funds." If the terms of the stay order are to be accorded any weight in determining whether the court could distribute the fund to the persons

other than the immediate purchaser, then, we submit that, as opposed to the stay order in the *Central States* case, the stay order here involved clearly contemplated that the impounded fund was not necessarily to be distributed to the immediate purchasers.

#### CONCLUSION

It is respectfully submitted that the judgment below is erroneous and should, accordingly, be reversed.

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DECEMBER 1948.

## APPENDIX

The Natural Gas Act of 1938, (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part as follows:

**SECTION 1.** (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce; to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

\* \* \* \* \*

**SECTION 19.** (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in

a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon



the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347):

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

No. 109.

JUL 24 1948

CLERK

OCTOBER TERM, 1948.

Y.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

**ANSWER OF SOUTHERN NATURAL GAS  
COMPANY (INTERVENER) TO PETITION  
FOR WRIT OF CERTIORARI.**

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No. 109.

IN THE

# **SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

---

FEDERAL POWER COMMISSION et al.,  
Petitioners,

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

---

## **ANSWER OF SOUTHERN NATURAL GAS COMPANY (INTERVENER) TO PETITION FOR WRIT OF CERTIORARI.**

---

Southern Natural Gas Company, as intervener and one of the distributees under the order herein directing distribution of funds (May 12, 1948. R. pp. 109-112), respectfully represents that the petition for writ of certiorari filed on behalf of the Federal Power Commission presents no substantial question for review, is without merit and should be denied.

## THE QUESTIONS ERRONEOUSLY SUGGESTED BY THE PETITION.

The petition for writ of certiorari inaccurately asserts that the Circuit Court of Appeals "considered itself compelled by this Court's decision in *Central States Co. v. City of Muscatine*, 324 U. S. 138; to direct the distribution of the fund to the immediate purchasers from Interstate."

The petition for writ also inaccurately asserts that the questions presented by the Record are (1) whether the *Central States* case compels the distribution ordered, and if so (2) whether the *Central States* case should be re-examined and either modified or disapproved.

It is true that the *Central States* case is cited in the opinion of the Court below and is adequate precedent both on reason and authority for that Court's refusal to undertake the anomalous functions necessary to any distribution of the fund down stream to so-called ultimate consumers; that is, to persons not in privity with Interstate and having no legal right to recover a refund of the excess charges paid by the intermediate pipe lines to Interstate. But wholly aside from the *Central States* case, the order for distribution was compelled by the record. The Court asserted no compulsion based on the *Central States* case.

There is, therefore, no occasion for re-examining the *Central States* case. If there were occasion, there is no substantial basis for questioning the correctness of that decision.

In the *Central States* case, the pipe line which challenged the rate order of Federal Power Commission in order to obtain a stay gave bond "to secure the refund to purchasers at wholesale of the amounts respectively due them if the Court should sustain the reduction of rates" (324

U. S., at p. 140). No impounding of excess charges was ordered by the Court. After the rates were sustained and the stay was discharged, Pipeline became liable to make refunds in accordance with the bond (ib). The plaintiff (Natural Gas Pipeline) became threatened with claims from down stream claimants, obtained a stay of suits to that end, paid the total amount of the overcharges into Court and asked the Court to administer that fund. All purchasers from Natural Gas Pipeline acquiesced, *without exception*, in that payment as discharging the obligation of Natural Gas Pipeline to make refund of the overcharge. That is not the situation here.

No pipeline purchaser from Interstate has waived its plenary and vested right to recover the overcharge, regardless of the disposition of the fund ordered impounded in this case. That order was imposed as a condition to the stay granted Interstate and not as an *ex parte* order limiting the indisputable right of the purchasers from Interstate, who paid the overcharges, to recover them in their own right.

(In the Central States case, one of the purchasers from the pipeline [Central States] consented in that case to or accepted, with all other purchasers from Pipeline, the payment of the excess into court in lieu of liability on the stay bond but it did not consent that its part of the overcharge should by-pass it and be distributed to or in trust for downstream purchasers. The other purchasers from Pipeline did consent to such downstream distribution. The position of Central States was upheld, subject to such consequences as might attach under State law.)

In the case at bar each purchaser from Interstate has the admitted right (which existed and still exists independently [a] of any bond to secure refund or [b] the

terms of the original ex parte stay order or [c] of any final order for distribution of that fund) to recover from Interstate the amount of overcharges exacted while the rate order was suspended.

If the fund in Court were by-passed and distributed down stream to ultimate consumers having no privity either with Interstate, which exacted the overcharge, or with Southern Natural and the other intermediate pipelines, which paid the overcharges to Interstate and sold the gas downstream to distributing utilities, Interstate would still remain liable by virtue of the Natural Gas Act and general principles of law to its direct privies from whom the overcharge was illegally exacted.

*Federal Power Comm. v. Natural Gas Pipeline Co.*,  
315 U. S. 575, 598;

*Arkadelphia Mill Co. v. St. Louis S. W. R. Co.*, 249  
U. S. 134;

Annotation, 131 A. L. R., p. 878.

If the Federal Power Commission or any downstream purchaser or ultimate consumer had conceived that Interstate should be required, as a condition to the stay and in addition to Interstate's primary and independent liability to make restitution to those who might pay the overcharge, also to set up a fund for distribution to the 700,000 ultimate consumers having no relation to Interstate, they should by intervention have confronted Interstate with that double exposure and have obtained a bond or stay fund in express terms for their benefit, if, indeed a fund for the reimbursement of 700,000 downstream ultimate consumers or the general public not parties to the rate suspended could have been properly imposed as a condition to the stay. That is a question of future policy or procedure which can not properly be raised by certiorari in this

matter or mooted in this proceeding. It may well be that Interstate would have abandoned the request for stay rather than take the double exposure.

It has not been adjudicated and can not possibly be adjudicated in this proceeding, or assumed in support of the pending petition for certiorari, that any rate for the resale of this gas which Southern Natural (or other pipeline purchaser from Interstate) charged their vendees, or which their vendees (where distributing utilities) in turn charged ultimate consumers, was illegal or excessive. The effect of the petition for writ is to ask this Court either to assume the equivalent of that fallacious hypothesis or else to instruct the Circuit Court of Appeals to enter upon a series of anomalous, expensive and academic hearings to determine whether long past rate schedules of all of these intermediate pipelines were so excessive as to make it inequitable for those lawfully entitled to restitution from Interstate to receive it either from the stay fund or, as implied in the petition, to recover it at all.

This would be an unwarranted assumption or involve the Court below in enormously expensive and extensive academic rate hearings as a predicate for distributing an average of less than \$4.00 to each of approximately 700,000 ultimate consumers; covering a period of four and one-half years.

The Federal Power Commission is itself without authority to take retroactive action or require reparation. The Fifth Circuit is wholly without authority in this proceeding to consider any rate structure of Southern Natural as a basis for impairment of the latter's indisputable right to receive restitution of the excess charges illegally exacted from Southern Natural. That restitution is due either from the fund or by plenary suit against Interstate.



The rates which Southern Natural charged its customers (whether fixed or effective under the Natural Gas Act or under State law) were not only lawful, but were, with the exception (in the case of Southern Natural because of its non-utility status as to its direct deliveries) of direct sales to consumers, the only rates which could be lawfully exacted.

The sole questions actually presented by the petition for writ of certiorari are therefore the questions:

(1) Whether this Court will direct the Circuit Court of Appeals to exhaust the impounded fund by distribution to persons admittedly having no legal right to any refund, either from Interstate or its pipeline privies, divert it from the privies of Interstate who paid the overcharge and thus expose Interstate to double liability, and expose Southern Natural (and other purchasers from Interstate) to the necessity of maintaining separate suits against Interstate for recovery of the illegal charges exacted.

(2) Whether the Court will impose on the Circuit Court of Appeals as an incident to its custody of a fund exacted as security, the function of multiple, complicated and synthetic rate hearings foreign to the Court's authority and administrative organization, involving each link between Interstate and the ultimate consumer, to determine whether and to what extent the price received by each link for re-sale of this particular gas was illegal or excessive during a long past refunding period, and to determine who, based on such findings, has the superior moral (but non-justiciable) claim to the fund.

These consequences obviously make the purpose of the petition inappropriate.

The gas purchased by Southern Natural from Interstate was a minor fraction of the gas produced or purchased and transmitted to its market by Southern Natural. Other obvious factors make such a synthetic retroactive rate inquiry wholly impracticable and non-justiciable, for a result which is, as to the 700,000 ultimate consumers, obviously *de minimis*.

The petition for writ of certiorari seeks an unrealistic and impractical result.

### **SUNDRY REASONS FOR DENYING THE PETITION.**

(1) The contention that the economic and therefore the legal incidence of excess rates has passed beyond the privies to the rate and lodged at some point down stream in the mine-to-market process had been rejected before the Interstate Commerce Commission, on Circuit and in State courts for years (Note, 131 A. L. R. 878), when the notion was finally (1918) disavowed in an opinion by Justice Holmes in *Southern Pacific Company v. Darnell-Taenzer Lumber Company*, 245 U. S. 531. The Court in that case approved the Commission's comment on "the endlessness and futility of the effort to follow every transaction to its ultimate result" and held that privity to the rate was essential to right of action for restitution, observing: "Probably in the end, the public pays the damage in most cases of compensated torts" (p. 534). By "public" the Court meant the general public rather than the ultimate party to the rate transaction.

The *Central States* case is based on the case cited. And see *Adams v. Mills*, 286 U. S. 397.

(2) In this proceeding there stand between Interstate, which collected the excess rate, and the general public in the area

- the intermediate pipe lines which paid the illegal exaction;
- in some instances another transmission line;
- a utility distributor—State jurisdiction;
- the ultimate consumer (commercial, manufacturing or domestic)—State jurisdiction.

The ultimate meters totalled approximately 700,000.

The meters in Southern Natural area were:

Industrial .....	1,959
Commercial .....	22,175
Domestic .....	213,637
	<hr/>
	237,771

Amount impounded as to all purchasers.

from Interstate ..... \$2,444,573.00

Average per meter—total..... \$3.49

Per annum ..... .79

Amount impounded as to Southern Nat-

ural (R. p. 52)..... 575,248.90

Average per meter—total..... \$2.42

Per annum ..... .54

(3) The overcharges paid by Southern Natural and other intermediate lines to Interstate represent in very large volume gas sold by the intermediate lines direct to private contract customers (industrial consumers) as to which no utility or regulated function is involved. In such instance there is not only no basis for assuming as a

fact that the intermediate pipeline realized excessive return on such business, but in the matter of that business the Federal Power Commission had not and could not declare the rate, and no State authority or commission had undertaken to do so.

Where the pipeline has not assumed utility status as to such contracts or deliveries, State authority can not regulate the prices (*St. Louis v. Mississippi River Fuel Co.*, 97 F. [2d] 726; *Frost v. R. R. Com.*, 271 U. S. 577; *Michigan Comm. v. Duke*, 266 U. S. 57). There is nothing in *Panhandle Eastern Pipe Line v. Indiana*, 332 U. S. 507, to suggest state power to regulate private contract rates of a non-utility. *Panhandle* had been declared a utility by the Indiana Court.

(4) Injunction bonds and stay orders can not properly be made to transform remote and speculative economic interests into justiciable causes of action, or to confer rate making powers on the Courts. They certainly can not be so phrased as to defeat the vested right of action to restitution held by those entitled to the reduced rate, who paid for their own sole account the overcharge.

## DECISIVE PROPOSITIONS AND AUTHORITIES.

### I.

The legal effect of the Natural Gas Act, as construed by approved analogy to the Interstate Commerce Act, is that the rates established pursuant to the Act are the lawful rates which must be applied in settlements for sales of gas subject to the Act; and that refunds of overcharges are payable to the purchaser or shipper who paid them, without respect to the question whether the purchaser or shipper has passed or can pass the final incidence of the overcharge, downstream, to successive pipe lines, distributors, wholesalers, ultimate consumers or the general public.

*Central States Electric Co. v. Muscatine*, 324 U. S. 138;

*Southern Pacific Co. v. Darrell-Taenzer Lumber Co.*, 245 U. S. 531, per Holmes, J.;

*Adams v. Mills*, 286 U. S. 397, per Brandeis, J.:

“In contemplation of law the claim for damages arose at the time the extra charge was paid. \* \* \* No useful end would be served by requiring the joining of 174,000 shippers in this proceeding.”

Sec. 4 (a) of the Natural Gas Act [15 U. S. C., Sec. 717 (d)] makes unlawful the collection of any amount in excess of the rate ordered by the Federal Power Commission. Such overcharges are denounced as “illegal exactions.”

*Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 598.

Southern Natural has accordingly a vested and plenary right to recover the overcharge from Interstate, in its own right, independently of and not arising out of or limited



by any bond or fund or ex parte order of the Court for stay purposes and wholly without respect to the question whether Southern Natural has or has not passed on the burden imposed by the stay.

*Arkadelphia Mill Co. v. St. Louis S. W. R. Co.*,  
249 U. S. 134;

Annotation, 131 A. L. R., p. 878.

Southern Natural's right to recover from Interstate remained plenary and independent regardless of the nature of the conditions imposed on Interstate for the stay or the class of persons, including Southern Natural, for whose benefit the conditions were imposed.

Authorities, *supra*.

To establish a common-law right to recover an overcharge, a showing of economic compulsion may be necessary, but no such showing or condition is necessary to maintain an action for recovery of an overcharge declared illegal, as here, by statute. However, in this case Southern Natural Gas Company was under compulsion to take gas from Interstate at the excess rate in order to protect its supply contracts from termination, thus meeting the test of compulsion under common-law requirements.

18 L. R. A. (n. s.) 124.

## II.

The assumption made by the petitioner that the total reduction which the pipe line privies of Interstate would have received currently, in the absence of stay, would have been immediately passed along, successively, to downstream pipe lines and distributors (municipal and other public utilities) until it reached, intact, the ultimate consumer, is not only speculative and a non sequitur, but is demonstrably erroneous. To entertain the assumption at

all, the Circuit Court of Appeals, in the absence of consent by those entitled to refund of the overcharge, would be compelled to assume the functions both of Federal and State rate commissions and determine after definitive rate hearings involving each step, each pipeline, each distributor and each class of ultimate consumers (industrial, commercial, heating load and domestic) whether or not (a) some commission would have had jurisdiction to pass the reduction along and (b) would, in fact, have ordered and maintained the reduction in effect throughout the period involved, after necessary consideration of each distributor's investment and earnings. That would be rate-making pure and simple. See *Newton v. Consolidated Gas Co.*, 258 U. S. 166, at p. 177.\*

In this chain of assumptions there are obvious broken links of regulatory authority due (a) to the absence of regulated utility status in the matter of direct pipeline sales to selected industries, (b) the absence, generally, of power in state regulatory agencies to order reparation or make retroactive findings; absent here with the apparent exception of the State of Illinois, and (c) freedom, generally, of municipal distributors from regulation of their rates.

(a) *City of St. Louis v. Miss. River Fuel Corp.*, 97 Fed. (2d) 726; *ib.*: 67 Fed. Supp. 549;

(b) As to Illinois, see *Natural Gas Pipeline Case*, 141 Fed. (2d) at p. 30;

As to others, see, e. g., *Central States Electric Case*;

(c) *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236, s. c. 257 U. S. 66—and see 18 A. L. R. at p. 946.

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\* "It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts, and should not be attempted, either directly or indirectly."

### III.

In imposing conditions for granting a stay the Court might appropriately require a bond to secure the payment of such actionable refund or damages as any party or any privy to the rate or even as any other person might proximately and justiciably sustain as a result of the stay; or might in lieu of bond require deposit in Court of the potential overcharge, for the same purpose.

The Court would have neither jurisdiction in ordering a stay under the Natural Gas Act nor equitable power to require that Southern Natural abandon or impair its right of action against Interstate and look solely to its claims under such bond or to such fund, even if the funds or bonds were adequate and for the sole benefit of Southern Natural.

Such bond or fund might or might not, according to the terms and basis on which it was ordered, constitute additional security protecting Southern Natural's plenary right of recovery against Interstate.

Obviously no power would exist to compel Southern Natural to look solely to a fund created in part for the benefit of some person having no justiciable claim to refund, or to subject its plenary cause of action to the Court's view of the question whether Southern Natural or the Ultimate Consumer has the better social or economic argument for reimbursement.

Analysis of the conditions imposed by the stay order here involved (R. pp. 1-3) indicates intrinsically that by the use of the words "return" and "those having a financial interest in the fund" the Court had in mind persons in privity with Interstate who had, out of their own pockets, paid the excess covered into the fund. They alone paid over moneys to be "returned." Their payments alone had a proximate financial relation to the fund, since

no ultimate consumer paid anything or had any independent justiciable right or interest in the rate or the fund.

The Circuit Court of Appeals, in the discussion preliminary to the issue of the stay order, even before the decision in the Central States Case, refused to limit the fund to ultimate consumers as was then requested by the Commission (according to accounts of the matter, based on the recollection of counsel who were present) and as limited in the stay order in the Panhandle case (*infra*), and thus refused to commit the Court to the erroneous result unsuccessfully sought in the Central States Case. This indicates that the Circuit Court of Appeals did not intend to misapply the customary objectives of a stay bond or funds by inclusion of speculative or ultimate economic interests as the beneficiaries.

#### IV.

In the Panhandle stay order (154 F. 2d 909) the Court inadvertently emphasized the ultimate consumer theory and on distribution most of the distributing companies entitled, as privies with Panhandle, to restitution of the overcharge, consented that the Court use its machinery to distribute the fund among "ultimate consumers." The final order as actually entered reversed or ignored the ultimate consumer theory, apparently in accordance with the sound dissent expressed by Judge Riddick, and directed distribution to those having the justiciable right to restitution, leaving ultimate consumers to any recourse they might have against their distributors in suits or proceedings under State laws. See Appendix Exhibit A, conforming to Judge Riddick's dissent.

The confusion and lack of judicial basis for distribution of a stay fund to ultimate consumers having no privity with the rate, even with the consent of the utilities entitled to the refunds, is demonstrated by the series of

opinions in the matter of the Natural Gas Pipeline refund in the 7th Circuit, which is mentioned below.

The assertion that the Natural Gas Act was devised and adopted for the benefit of ultimate consumers is not only untenable and misleading.

*Fed. Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591 (600);

*Illinois Nat. Gas Co. v. Pub. Serv. Co.*, 314 U. S. 498, 506.

It involves a basic misconception of the Federal Power Commission's restricted jurisdiction: The ultimate consumer is, from the standpoint of his economic interest in rate making and stay proceedings under the Natural Gas Act indistinguishable from the general public.

"The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale." *Central States Electric Case*, 324 U. S. at p. 144.

The intended distribution to ultimate consumers would reduce the formula to the status of *de minimis*. A large volume of the gas involved goes direct to industries under private contracts at rates not subject to regulation by the Federal Power Commission and not subject to utility regulation by local commissions where the delivering pipeline has not assumed utility status. The residual gas reaching the so-called ultimate consumer would, in Southern Natural's area, represent an average overcharge of materially less than \$1.00 a year. This impact would not seem to be sufficient to warrant the novelty of requiring distribution to classes having no legal, equitable or justiciable claim and having so negligible a financial interest.



V.

A stay order purporting to create an equity otherwise non-existent, could not validly ignore, and the initial order here should not be construed (a) as ignoring the primary purpose for imposing terms in ordering a stay, viz., protection of those actually paying the overcharge, and (b) as going further and giving the Court an anomalous contingent fund to distribute gratuitously and arbitrarily in trifling amounts among the 700,000 ultimate consumers having no justiciable interest in the immediate rate reduction and unable to show provable damage resulting proximately from the stay.

The ultimate consumer theory as sought to be applied in this proceeding is obviously unsuited to the revisory functions and organization of the Circuit Court of Appeals, which is definitely *forum non conveniens* in the matter of impounding and distributing funds through the machinery of an appellate court in millions of trifling amounts.

VI.

*Analysis of the Natural Gas Pipeline Refund* (128 Fed. [2d] 481, 129 Fed. [2d] 515, 131 Fed. [2d] 137, 134 Fed. [2d] 265, 141 Fed. [2d] 27, 324 U. S. 138). The proceeding in the matter of the Natural Gas Pipe Line Fund demonstrates the confusion, lost motion and administrative detail involved in the effort to rationalize the "ultimate consumer" theory, *even where those who have paid the overcharge consent that distribution may be passed along.*

On July 1, 1942 Natural Gas Pipeline paid into Court the excess (324 U. S. 141) amounting to \$6,377,913.52 (131 Fed. [2d] 138) and on September 2, 1942 the Court issued its show-cause order for distribution of the entire fund to elaborately analyzed "eligible consumers," excluding those

who burned gas industrially or commercially or for the purpose of heating, according to no known or conceivable principle (except, presumably, that the Court would not have extended the reduction to those classifications if it were a rate making authority with jurisdiction to readjust the utilities' rates).

Any formula for diversion of the refund from those who paid the overcharges and for its distribution to ultimate consumers not in privity as to the rate or the overcharge, is arbitrary and beyond the jurisdiction or judicial discretion of the court.

## VII.

### **The Panhandle Eastern Fund (Eighth Circuit).**

The Eighth Circuit in the matter of the Panhandle Eastern Fund (154 Fed. [2d] 909) directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with State law. Substantially the same procedure was indicated by the Supreme Court in the *Central States* case, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635 (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere—with the distributors who received refunds, as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as

in this litigation may be determined entitled thereto." See original stay order entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order, reflecting the extra-legal position of the Commission, improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle from distribution companies. Most of these distributors \* \* \* have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers." 154 Fed. (2d), at p. 910.

As we have pointed out, the order for distribution as actually entered by the 8th Circuit retreated from this broad suggestion and the comment quoted can not be regarded as a precedent, except in the most general sense (154 Fed. [2d] 910). Judge Riddick's dissenting view clearly prevailed in the final opinion for distribution. See APPENDIX A.

### VIII.

#### **Distribution in the Central States Case.**

In the *Central States* Case, that intervener was both a direct distributor to consumers and an intervening pipeline which made deliveries to a distributor. Its status as a direct distributor may have raised some question whether state authority had a right to make a retroactive order. That was held to be a question for the State courts. Justice Douglas thought that the distribution of the fund to the local municipalities, in trust for Central to recover it if it could under state law, was a proper disposition. The majority considered that the problem was one for state determination but could not agree that Central States, entitled to the fund so far as the Seventh Circuit

was concerned, should be put to that burden, and made the following observation as the utmost that the Seventh Circuit should require:

"The most the court below should do, in view of the apparent controversy as to the consumers' right to a refund of rates heretofore paid to Central, is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to Central, and that if it be adjudged, as a result of such litigation, that Central is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to its disposition." 324 U. S. at pp. 145, 146.

In the case at bar no State authority can possibly have any jurisdiction to make any order of reparation binding on the pipelines or any retroactive or prospective rate binding on their deliveries to distributors.

There is, accordingly, no conceivable reason why the Circuit Court of Appeals should have withheld or be required to withhold the fund from present distribution to the pipelines which paid the overcharge and have a vested right to recover it.

July, 1948.

Respectfully,

FORNEY JOHNSTON,  
Attorney for Southern Natural Gas  
Company, Intervener.





**APPENDIX.**

**EXHIBIT A.**

**Opinion Authorizing Order Entered October 8, 1946.**

United States Circuit Court of Appeals,  
Eighth Circuit.

No. 12,466.

Panhandle Eastern Pipe Line Company, a  
corporation, Illinois Natural Gas Com-  
pany, a corporation, and Michigan Gas  
Transmission Corporation, a corporation,  
Petitioners,

vs.

Federal Power Commission, City of Detroit,  
Michigan, County of Wayne, Michigan,  
Michigan Consolidated Gas Company, a  
corporation, and Michigan Public Service  
Commission,

Respondents.

Before Sanborn, Woodrough, and Riddick, Circuit Judges.

Per Curiam:

This Court has been confronted with a conflict of views relative to the disposition of so much of the fund impounded under the stay order of December 7, 1942, as is claimed by distributors. Those who have spoken in the interests of the ultimate consumers have urged this Court to retain that part of the fund in question until the distributors who claim it have established their alleged exclusive rights in state courts of competent jurisdiction. Those representing the distributors contend, in reliance upon the case of Central States Electric Co. v. City of Muscatine,

324 U. S. 138, that so much of the fund as is allocated to the claiming distributors should be turned over to them without further delay and without the imposition of any burdensome conditions.

The stay order of December 7, 1942, which established the impounded fund, provided that the fund should be held "for the benefit of the ultimate consumers or of petitioners (Panhandle Eastern Pipe Line Company) as in this litigation may be determined entitled thereto." The litigation involved the validity of an order of the Federal Power Commission reducing the wholesale rates being charged by Panhandle for gas sold by it to distributors which was resold by them at retail to ultimate consumers. The order of the Commission did not purport to affect retail rates charged by the distributors. No ultimate consumer and no distributor now claiming the right to participate in the fund was, at the time the stay order was entered by this Court, a party to the litigation. As to all who were not parties, the stay order was an ex parte order made to preserve the status quo and to indemnify those who would be injured by the stay of the rate reduction order of the Federal Power Commission if that order was ultimately held to be valid.

While, at the time the stay was granted, this Court evidently assumed that it would be the customers of the distributors who would be injured by the granting of the stay, the Court did not and could not then adjudicate or declare that the fund should belong and be distributable solely to ultimate consumers or to Panhandle. The Court was not attempting, at the time the stay order was entered, to determine who might ultimately be entitled to the fund impounded, nor was it attempting to cut off or affect the legal or equitable rights, in the fund, of those not parties to the litigation. The question before the Court then was whether the application of Panhandle for a stay of the

order of the Commission should be granted, and, if so, what terms and conditions should be imposed upon Panhandle in connection with granting the stay applied for.

From a strict legal standpoint, the fund is made up solely of overcharges in wholesale rates collected by Panhandle from distributors which were required to pay the unreduced wholesale rates during the impounding period. The ultimate consumers of gas furnished by Panhandle to distributors have been prejudiced by the stay order only to the extent that the rates which they paid distributors for the gas during the impounding period exceeded the rates which the consumers would have paid had no stay order been entered. The equities of consumers, therefore, depend upon whether they would have paid less for gas during the impounding period if the reduction in wholesale rates ordered by the Federal Power Commission had become effective in accordance with the terms of the rate reduction order. The distributors which have filed disclaimers of any interest in the impounded fund have, in effect, conceded that, but for the stay order, the reduction in wholesale rates ordered by the Federal Power Commission would have been passed on by such distributors to their customers, and that these customers are therefore exclusively entitled to so much of the impounded fund as was contributed by the disclaiming distributors.

Whether the customers of a distributor which is claiming the exclusive right to a refund of the overcharges paid by it are entitled to have or to share in the contribution which that distributor made to the fund, is, under the ruling of the Supreme Court in the Central States Electric Co. case, *supra*, a question of state law to be determined by the courts of the state. We think that, *prima facie*, the contribution of such a distributor is returnable to it.

Our conclusion is that it will be to the advantage of all those who are interested in that portion of the impounded

fund which is claimed by distributors to turn it over to such claimants upon terms and conditions which will protect the rights, if any, of ultimate consumers and will enable them to enforce such rights as they may have against the distributors, in the state courts. These distributors are solvent and the funds in their possession will be as accessible to persons claiming superior rights as the funds would be if retained by this Court. The amount contributed by each such distributor has been definitely ascertained and is not in dispute. Interest on the amounts will not be allowed, since the funds impounded have been invested at less than one per cent interest and this Court has ordered that the earnings of the impounded fund be applied to expenses of distribution.

Appropriate orders will be entered to effectuate the conclusions reached.





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CHARLES FRANKLIN

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 109

FEDERAL POWER COMMISSION, *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI.

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, IN OPPOSITION.**

WILLIAM A. DOUGHERTY,  
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Attorneys for Interstate Natural Gas  
Company, Incorporated.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 109

FEDERAL POWER COMMISSION, *et al.*

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

---

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

---

No. 212

ILLINOIS COMMERCE COMMISSION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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**BRIEF OF INTERSTATE NATURAL GAS  
COMPANY, INCORPORATED,  
IN OPPOSITION.**

**Statement.**

So far as it goes, this respondent adopts the statement contained in the petition filed on behalf of the Federal Power Commission in No. 109.

In addition, it should be pointed out that the record in No. 733 October Term, 1946, was made in 1942 and that, therefore, certain facts alleged in the brief filed on behalf of the Federal Power Commission in support of its petition are inaccurate, viz.: Mr. Frank H. Lerch is not, and has not been for some years past, president of either Interstate Natural Gas Company nor Mississippi River Fuel Corporation or any Standard Oil Company (N. J.) affiliate—a fact whereof the Commission has had notice and knowledge; also, Standard Oil Company (N. J.) has recently disposed of all of its interest in Mississippi River Fuel Corporation. (See Commission brief, p. 17). The affiliation between these two companies because of interests of Standard Oil Company (N. J.) no longer exists.

Since this brief is in opposition to all of the petitions arising out of the refund case (Nos. 109, 188, 209, 212), it is necessary to point out the interest, if any, of each of the petitioners.

The Federal Power Commission (herein referred to as the "Power Commission"), petitioner in No. 109, derives its authority, if any, in the premises from the Natural Gas Act of 1938 (c. 556, 52 Stat. 821, 15 U. S. C. Sec. 717, *et seq.*). The rate case instituted before it was finally determined in its favor by your Honorable Court in *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682 (rehearing denied October 13, 1947, 332 U. S. 785). Effective October 1, 1947, this respondent, Interstate Natural Gas Company (hereinafter referred to as "Interstate"), billed for its gas sales at the Power Commission prescribed rate (R. 18).

The Public Service Commission of the State of Missouri (hereinafter referred to as the "Missouri Commission"),

Petitioner in No. 188, represents only Missouri consumers receiving gas indirectly from Mississippi River Fuel Corporation (hereinafter referred to as "Mississippi") (R. 92); and the Illinois Commerce Commission (hereinafter referred to as the "Illinois Commission"), Petitioner in No. 212, represents only Illinois consumers receiving gas indirectly from Mississippi (R. 68). The Commission entered a rate order against Mississippi (4 F. P. C. 340) which subsequently was reviewed and remanded by the Court of Appeals for the District of Columbia (163 F. 2d 433) and settled by stipulation on May 4, 1948. By said stipulation Mississippi gives effect to that portion of the rate order in the Interstate case accruing since January 20, 1946, the effective date of the Power Commission's remanded order against Mississippi (See Power Commission's petition and brief, p. 15n).

The Memphis Light, Gas and Water Division of the City of Memphis, Tennessee (hereinafter referred to as "Memphis"), petitioner in No. 209, purchases its natural gas requirements from Memphis Natural Gas Company (hereinafter referred to as "Memphis Natural"). Memphis is not subject to regulation and it claims a part of the fund awardable to Memphis Natural in its corporate capacity and not for distribution to any consumer in fact (R. 25-26).

While this brief is in response to all of the petitions filed in Nos. 109, 188, 209 and 212, Interstate does not thereby indicate that the petitions should be considered jointly. On the contrary, each petitioner should sustain its own burden in attempting to establish grounds for certiorari.

## ARGUMENT.

### I.

#### Jurisdiction.

Interstate objects, on jurisdictional grounds, to the granting of certiorari in No. 109 by the Power Commission; No. 188 by the Missouri Commission; and in No. 212 by the Illinois Commission.

##### a. Principles of Law.

Of long standing is the general rule that the jurisdiction of the Supreme Court can be invoked only by one having a personal interest in the litigation, and not merely an official one. *Smith v. State of Indiana, ex rel. Lewis*, 191 U. S. 138, 148-149. And this interest must be such that not only will a benefit to policy result but one must stand to have property diminished, burdens increased or rights detrimentally affected by the order up for review. *McCandless v. Pratt*, 211 U. S. 437, 443, 445; *Farmers Loan & Trust Company v. Waterman*, 106 U. S. 265; *In Re Michigan-Ohio Boulevard Corporation*, 117 F. 2d 191 (C. C. A. 7); see *Barriger v. Louisville Gas & Electric Company*, 196 Ky. 268, 244 S. W. 690, 31 A. L. R. 1408, 1411. "The interest must be substantial, and a merely nominal party to an action cannot appeal." *Hamilton Trust Company v. Cornucopia Mines Company et al.*, 223 Fed. 494 (C. C. A. 9, 1915, cert. den'd 239 U. S. 641); *Ohio Contract Carriers Association v. Public Utility Commission*, 140 Ohio St. 160, 42 N. E. 2d 758, 759 (Ohio Sup. Ct., 1942). Aside from the position of the parties in respect of interest and

aggrievement, it also is necessary that a justiciable cause be presented to the court—not one asking for “a gratuitous advisory judgment” upon a matter which has become moot by supervening events. *Public Utilities Commission of Ohio et al. v. United Fuel Gas Company et al.*, 317 U. S. 456, 466. That the United States is seeking review, does not lessen the jurisdictional strictures (*United States v. Union Pacific Railroad Company*, 105 U. S. 263) unless there is some special statutory provision. See *United States v. Maria De La Paz Valdez De Conway et al.*, 175 U. S. 60, 69-70. Certainly an agency of a government department would have no greater rights.

In the light of the foregoing principles, Interstate respectfully submits that these petitions do not meet the required jurisdictional tests.

#### **b. The Federal Power Commission.**

The Power Commission has carried through successfully all that it set out to do and could do under its organic law,—i.e. the Natural Gas Act. That Act sets forth what the functions of that Commission are and what it may do. Its legitimate work in reference to the rates in controversy ceased on the final affirmance by this court of the rate determination.

The Power Commission stood no loss, nor did it stand to be detrimentally affected by the disposition of the fund. Its position was only an official one and that of a nominal party only since the matter of distribution of impounded funds was docketed as the appeal to the Circuit Court had been docketed. The most that could be said for the Power Commission is that it is interested in the policy involved. From the requirements of the situation of parties seeking



review set forth above, it is clear that the Power Commission has no standing in this Court. It seems clear, also, that the Power Commission, if it is to be heard at all, should stand in the position of *amicus curiae* because of its obvious general interest in the question involved. This is provided for adequately in your Honorable Court's Rule 28 which gives to the Commission the opportunity as of right to appear in such role.

The Power Commission does not represent the consumers as do local and state commissions. (See *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company et al.*, 249 U. S. 134, 146.) The consumers are the ultimate distributees of gas and, as such, are bound inextricably with the distribution function. While protection of consumers at retail may have been the purpose of the Natural Gas Act, the means adopted were limited in scope and comprehended only the Commission's participation in the wholesale function.<sup>1</sup> The Act has no application "to the local distribution of natural gas or to the facilities used for such distribution \* \* \*." Section 1(b), 15 U. S. C. 717(b). Indeed, no consumer even has standing before the Power Commission to complain of a rate over which it has jurisdiction. The jurisdiction to proceed on a rate case is given to the Power Commission only "upon its own motion

<sup>1</sup> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act but from the exceptionally explicit legislative record, and from this court's decisions." (*Central States Electric Co. v. City of Muscatine*, 324 U. S. 138 at 144.)

or upon complaint of any State, municipality, State Commission, or gas distributing company \* \* \*.”<sup>2</sup>

**c. The Missouri Commission and the Illinois Commission.**

Interstate does not assert that state commissions do not represent the consumers within their respective bounds. Beyond that, however, all of the principles set forth above in respect of a party's right to seek review are applicable.

It has been pointed out that these state commissions represent consumers who get their gas only through Mississippi in so far as this case is concerned. Consequently, it is the rate situation of Mississippi which is involved. Mississippi, as the Power Commission and the Missouri and Illinois Commissions admit (Commission brief, p. 15n; Stipulation, Appendix A to opposition brief of Mississippi;

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<sup>2</sup> Natural Gas Act, *supra*, Sec. 5(a), 15 U. S. C. Sec. 717d which provides in the part material here as follows:

“Sec. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: \* \* \*”

Section 13, 15 U. S. C. Sec. 717l provides:

“Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.”

Illinois Commission brief, p. 18n), has given effect to the Interstate rate reduction back to January 20, 1946, the date when the Power Commission's rate order against Mississippi was to be effective and the old rates found to be excessive were no longer of any effect. Thus, all distributing utilities in Missouri and Illinois who were supplied by Mississippi have received all benefits to which they are entitled under the rate reduction order against Mississippi. The funds impounded prior to that time in the court below represented money paid to Mississippi under the only legally effective rate then in force and free of any claim for reparations. (See *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618; *Mississippi Power & Light Co. v. Memphis Natural Gas Company*, 162 F. 2d 388 (C. C. A. 5).)<sup>3</sup>

It is apparent, therefore, that Mississippi's customers have gained all that they could have received—in the same manner and to the same extent if a stay had not been granted in the Interstate rate case and if Mississippi had, on January 20, 1946, put into effect and passed on the benefits of the wholesale price it paid to Interstate. It is earnestly contended, therefore, that the consumers represented by the Missouri and Illinois commissions have the right to receive their due from the utility distributors no

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<sup>3</sup> In this connection it should be noted that the Power Commission's own rules provide:

"No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948) Part 154.2, 12 Fed. Register 8598.)

matter what is the outcome of these causes. They could not have obtained any more had the Commission rate reduction orders never been contested. Thus benefited, questions as to their rights are no longer justiciable and certiorari should therefore be denied. In the matter of granting the stay and appending the condition of impoundment, thereto, the court below was exercising equity powers (*Inland Steel Company v. United States et al.*, 306 U. S. 153), and thus acting, your Honorable Court may consider this supervening fact. (*Public Utilities Commission of Ohio v. United Fuel Gas Company et al.*, 317 U. S. 456, 466.)

## II.

### The Merits.

The essence of each of the petitions is that it was error for the court below to apply *Central States Electric Company v. City of Muscatine* (324 U. S. 138) to the situation presented here. It is claimed that the court below felt compelled to apply that case; and that if it is applicable it should be overruled. Interstate will show that the result reached by the court below was proper, legally and equitably sound, and the only realistic result that could be reached by an equity court acting within its proper ambit.

#### a. What the Court Below Did.

It is apparent from a reading of the opinion below (R. 103-105, 166 F. 2d 796) that the Circuit Court after "A careful consideration of the opposing contentions, in the light of the undisputed facts" (R. 105) felt that its only course was to award to the pipeline companies privy to

the contracts with Interstate the amounts which they paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them" (*id.*). The court below merely cited the *Central States* case in a footnote and without comment. Thus it is clear that the contentions plus the facts really moved the court to its conclusion. The court did, however, preserve the rights, if any, in the distributive parts of the funds of others by stating that its action was without prejudice to such rights, if any.

Contrary to the erroneous contention of petitioners that the court below reached its result under a feeling of compulsion from the *Central States* case, the fact is that the court had the breadth of discretion in the premises given to an equity court of original jurisdiction (see Illinois Commission brief, pp. 22 *et seq.*) and in exercising this discretion it reached a result based upon a proper evaluation of facts, contentions, and equities (see Part "b"). Regardless of the dissatisfaction of petitioners with the *Central States* case, however, that case did propound one applicable principle which did not spring full grown from it alone. It is:

A federal court as such has no rate fixing authority. 324 U. S. 138, 143.

This is no new pronouncement but has been the law for some time. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264; *Newton v. Consolidated Gas Company*, 258 U. S. 165, 177.

It will be shown that the judgment of the court below was otherwise fully justified without any support from the majority view of the *Central States* case.



### b. The Court Below Exercised Discretion.

The Natural Gas Act provides for court review in Section 19(b) (15 U. S. C. Sec. 717r(b), and by Section 19(c) (15 U. S. C. Sec. 717r(c)) it is provided that:

“The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.”

This in effect means that it is within the court’s discretion whether a stay will or will not be granted (*Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment.<sup>4</sup> The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. *Inland Steel Company v. United States*

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<sup>4</sup> In *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, this court, per Stone, J., stated (at 271):

“The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State R. Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Cummings v. Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *People’s Nat. Bank v. Marye*, 191 U. S. 272, 287, 48 L. ed. 180, 187, 24 S. Ct. 68; see *Norwood v. Baker*, 172 U. S. 268, 294, 43 L. ed. 443, 453, 19 S. Ct. 187. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, 77 L. ed. 1208, 1211, 53 S. Ct. 602. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey v. McDonald*, 109 U. S. 150, 157, 27 L. ed. 888, 890, 3 S. Ct. 136, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co. v. Newton* (D. C.), 267 Fed. 231, 273; *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 S. Ct. 264.”

*et al.*, 306 U. S. 153; *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coastline Railroad Co. v. Florida et al.*, 295 U. S. 301, 309. In that case it was stated: “Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it \* \* \*” (*id* at 310).

The case which best illustrates the breadth of discretion involved is *Inland Steel Company v. United States, et al.* (306 U. S. 153). In that case this court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that not only is the discretion as to the granting of a stay order with or without conditions very broad but also in such a way that, along with the authority of *Ford Motor Company v. N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company v. City of Muscatine* (*supra*), that “\* \* \* the federal court which has this fund has considerable discretion in its management. *United States v. Morgan, supra*. I fail to see how it abused its discretion in handing the fund over to the officials.”

### c. There Was No Abuse of Discretion.

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the court

exercised its discretion both in respect of applicable facts and applicable law.

**(i) The Fund and Its Origin.**

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order. On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which \$1,320,978 is applicable to excess charges to Mississippi River Fuel Corporation; \$581,721 is applicable to excess charges to Southern Natural Gas Company; and \$328,095 is applicable to excess charges to United Gas Pipe Line Company [for account of Memphis Natural Gas Company] from June 15, 1943 to December 10, 1945; and \$235,646 is applicable to excess charges to Memphis Natural Gas Company from December 10, 1945 through September, 1947," represent the difference between the attacked and the prescribed rates (R. 57-58).<sup>5</sup>

As indicated in the various petitions, all purchasing pipe lines were themselves "natural gas companies" under the Natural Gas Act. Each has since passed through some form of rate determination:

<sup>5</sup> The figures above quoted are from the Power Commission's answer in the court below. As a matter of fact, these amounts are \$1,484,582.53, \$688,156.71, \$344,606.38 and \$247,859.44, respectively (R. 110).

Memphis Natural, by a consent order, reduced its rates effective July 26, 1943. There now is a dispute as to what was promised in respect of future benefits arising from the Interstate rate order. There is no dispute, however, that the promise was prospective from some date subsequent to the Memphis Natural consent order. In 1946, Memphis filed schedules increasing its rates which were suspended and subsequently withdrawn. (Power Commission brief p. 15, note 10).

Southern Natural Gas Company stipulated as to a reduction on July 19, 1946 (Power Commission brief p. 15, note 11).

Mississippi, after remand to the Commission by the Court of Appeals for the District of Columbia, entered into a stipulation on May 4, 1948, settling its rate controversy (Power Commission brief p. 15 note 12), and rate schedules effecting said purpose were accepted by the Power Commission on July 20, 1948, reciting changed conditions entitling Mississippi to higher rates than those prescribed in the remand order. (See in the Matter of Mississippi River Fuel Corporation, F. P. C. Docket No. G-462, July 20, 1948—not yet published).

There is no dispute that the immediate obligors of Interstate were the above three pipe lines and that they directly paid to Interstate the funds now in dispute (R. 57). It is apparent, also, that the rate situation of each of these companies has not been clear for either all or a substantial part of the impoundment period. Either rates had recently been stipulated or else there at least was reason to request higher rates. The position of petitioners, however, is that the pipe lines paid Interstate the money collected mediately from consumers. How much of this, had the reduction been effective at once, would have stayed in the pipe line companies' hands is purely speculative and

dependent entirely upon the reasonableness of their rates at the times of collection.

“The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed.” *Board of Trade v. United States*, 314 U. S. 534 at 546.

## (ii) The Power Commission's Attitude.

The Power Commission, as contrasted with its counsel now taking an apparently contrary position, has recognized that within the constitutional regulatory scheme these pipe lines are entitled to the funds now impounded and owed to them.<sup>6</sup> While there is not strict contemporaneity between the Natural Gas Act and the pronouncement set forth in footnote 6, still the Commission's construction of the rights given is entitled to weight by the courts. *Great Northern Railway Company v. United States*, 315 U. S. 262, 275; Cf. *Swendig v. Washington Water Power Co.*, 265 U. S. 322; *Social Security Board v. Nierotko*, 327 U. S. 358, 367.

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<sup>6</sup> “The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by \$301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a ‘commodity’ charge, and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volume of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision.” (F. P. C. Opinion No. 126. In re: Mississippi River Fuel Corporation, et al., Docket G-462, 4 F. P. C. 340 at 359; R. 74).



**(iii) Any Other Result Would Require the Court to Engage in Rate Making.**

It is well recognized that it is not part of the judicial process to engage in the legislative function of making rates. *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 143; *Central Kentucky Natural Gas Company v. Railroad Commission*, 290 U. S. 264; *Newton v. Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence.

All three of the purchasing pipe line companies make sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by the Power Commission, the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U. S. 507. With this situation, what could the court below do? If all of the claimed funds were handed out to so called ultimate consumers, the court, contrary to the assertions of petitioners, would be indulging in local law and would impinge upon local regulation—a fact really recognized in the Power Commission brief (p. 10n). This is indisputable since some of the funds result from sales that are only regulable by states. Therefore, the court below would have had to make an allocation of the fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for all gas regardless of who ultimately would use it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto,

would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by each purchasing pipe line company. It would entail an entry into a myriad of questions of fact and none of law. *Cf. Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination inter alia of a return to which each pipe line was entitled from its direct state-regulable sales and thus a determination of the proper state rate. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in which payments were made into the registry of the court. Considering these factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor. On none of these was the court below advised. Conceivably, if the court below had awarded the fund to all consumers, a pipe line company might find itself mulcted further but for the same sales by a subsequent award of reparations by a competent state agency.

Bearing in mind that a federal court may not engage in rate making because it is not a judicial power and in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, 271), it would be hopelessly impracticable and unfair, as well as an usurpation of legislative and state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co. v. Florida*, 295 U. S. 315, where

Mr. Justice Cardozo, in respect of restitution awards after a rate determination, stated at p. 318:

“The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large.”

**(iv) Conclusion as to the Exercise of Discretion.**

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that the three pipe line companies paid the money to Interstate; that only these companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that some of the sales by the pipe line companies were subject only to state regulation if at all; and that it could pass on any interest in the fund beyond these companies only by indulging in the non-judicial and extra jurisdictional activity of federal and state rate making, it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

The court below acting as a court of original jurisdiction was sensitive to its responsibilities of staying within its proper federal and judicial bounds and to exercising a jurisdiction consistent with the practicalities of the situation. Its judgment, therefore, was the proper one in the premises.

## III.

## Conclusion.

Reduced to the simplest terms, petitioners are dissatisfied with the fact that a stay order operates effectively to suspend a Power Commission rate order pending review. The granting of such stay, however, with or without the condition of impoundment, is a matter of equitable grace (*Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U. S. 4, 9-11; *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264). The complaint that downstream customers are, by the stay device, deprived of the benefits of a wholesale rate reduction is speculative and one in which speculation could never be reduced to certainty without transgressing the judicial and federal functions. To the assertion that the action of the court below encourages frivolous review because a subsidiary or affiliate may benefit thereby and may pervert the intention of Congress in enacting the Natural Gas Act to protect ultimate consumers, the answer is contained in the power of the court to refuse to grant a stay if unsubstantial grounds of error are alleged, in the principle that equity may change the stay order (see *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co. et al.*, 249 U. S. 134), and in the fact that the court below in granting the stay reserved jurisdiction to cancel or modify the stay order for the protection of the real parties in interest (R. 2).

There is no conflict between the decision now challenged and those of this Court or any other circuit court of appeals. Nor has the court below decided any important matter upon which this Court should pass. On the contrary, the Court below has exercised its powers only in accordance with

well accepted principles pronounced by this Court and within the practicable limits of equity jurisprudence. We therefore respectfully submit that all of the petitions for certiorari in this matter should be denied.

WILLIAM A. DOUGHERTY,

ALLEN T. SHOTWELL, L

HENRY P. DART, JR.,

HENRY GRADY PRICE

JAMES LAWRENCE WHITE,

Attorneys for Respondent, Interstate  
Natural Gas Company, Inc.





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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 109

FEDERAL POWER COMMISSION, *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF MISSISSIPPI RIVER FUEL CORPORATION  
IN OPPOSITION.**

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JAMES LAWRENCE WHITE,

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Corporation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

---

**BRIEF OF MISSISSIPPI RIVER FUEL  
CORPORATION IN OPPOSITION.**



### Statement.

The situation of Mississippi River Fuel Corporation (hereinafter referred to as "Mississippi") in respect of the fund impounded in the registry of the Court below is peculiar. It will be necessary, therefore to detail with some particularity what has transpired both in the Court below and as to Mississippi's own rate situation.

The general background of the proceedings in the Court below, as set forth in the statement contained in the petition filed on behalf of the Federal Power Commission in Case No. 109, is adopted by Mississippi, except in so far as it is necessary to add to it and correct it. In the first place, Mr. Frank H. Lerch is not, and has not been for some years past, President of either Interstate Natural Gas Company (hereinafter referred to as "Interstate") or Mississippi River Fuel Corporation or any Standard Oil Company (N. J.) affiliate, and since the record was made in the original Interstate rate case (No. 733, October Term, 1946) Standard Oil Company (N. J.) has disposed of all of its interests in Mississippi River Fuel Corporation (see Commission brief, p. 17). Affiliation between Interstate and Mississippi on account of interests of Standard Oil Company (N. J.) no longer exists.

Mississippi provides the only ground for intervention in this matter by the Public Service Commission of the State of Missouri (hereinafter referred to as the "Missouri Commission"), the Petitioner in No. 188, and the Illinois Commerce Commission (hereinafter referred to as the "Illinois Commission"), the Petitioner in No. 212 (R. 68, 92). Since the record was made in the Court below Mississippi has settled its rate case instituted by the Federal Power Commission (hereinafter referred to as "Power Commission") by stipulation arising as a result of a remand

to the Power Commission by the Court of Appeals for the District of Columbia (*Mississippi River Fuel Corporation v. Federal Power Commission*, 163 F. 2d 433). The stipulation settling the case provided that Mississippi file rate schedules for the period from January 20, 1946 (the effective date of the Commission's order against Mississippi) through and including the month of September 1947 at a rate less than that to be applicable after such period so as to give effect to the affirmance of the Power Commission's rate order in the Interstate case. All of this is recited in said stipulation and on July 20, 1948 the Power Commission accepted the filing of such rate schedules and terminated its proceeding against Mississippi. (See stipulations annexed hereto as Appendices "A" and "B"; see also Power Commission brief, p. 15n.)

Accordingly, Mississippi will direct its brief in the main to the contentions of the Missouri and Illinois Commissions and to their standing to question the judgment of the Court below. The Power Commission has directed its petition to the judgment of the Court below generally and, therefore, Mississippi must answer it. The petition of Memphis Light, Gas & Water Division (hereinafter referred to as "Memphis") (No. 209), while directed mainly to the right of Memphis Natural Gas Company (hereinafter referred to as "Memphis Natural") nevertheless requests that the petition of the Federal Power Commission should also be granted.

The Power Commission apparently seeks to stand before this Honorable Court as the representative of all of the consumers involved in the downstream sales made by Interstate. In its brief in opposition, Interstate has pointed out that the Power Commission has exhausted its jurisdiction in the premises in so far as Interstate is concerned.

It should also be pointed out that the Power Commission has by a final order disposed of its rate investigation of Mississippi and has, therefore, exhausted all of its jurisdiction in respect of the past rates of Mississippi.

The Missouri Commission is limited in its representation to the consumers in Missouri receiving gas indirectly from Mississippi and the Illinois Commission is limited in its representation to the Illinois consumers receiving gas indirectly from Mississippi. The settlement of the Mississippi rate case as pointed out above has given to the distributing companies serving all of these consumers that portion of the reduced rate ordered in the Interstate case accruing since the effective date of the Commission's rate determination against Mississippi.

## ARGUMENT.

### I.

#### Jurisdiction.

Mississippi objects to the granting of certiorari pursuant to any of the petitions filed in this matter in so far as the review accorded under such certiorari would affect it on the ground that all questions which properly could be before the Court below or before this Court upon review have become moot and nonjusticiable. Mississippi, as the Commission admits (Commission brief p. 15n), has given effect to the Interstate rate reduction for the total period from the time the Power Commission order was effective against Mississippi (i.e. January 20, 1946) up until the time the New Interstate rates became effective. Thus, all consumers indirectly supplied by Mississippi wherever

situated are in position to receive every benefit which they would have received had Mississippi on the effective date of the Commission's rate order against it immediately have filed new rate schedules giving effect as of that moment to the reduced rate ordered in the Interstate case and had the local distributing companies immediately passed on that reduction. Prior to that time, the money paid by Mississippi and impounded pursuant to the order of the Court below represented a part of the rate paid to Mississippi under the only effective rate schedules then in force and free from all claims for reparations (*Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618; *Mississippi Power & Light Company v. Memphis Natural Gas Company*, 162 F. 2d. 388 (C. C. A. 5)).<sup>1</sup>

As a result of the above facts and the principles that the Natural Gas Act does not give the Power Commission jurisdiction to award reparations and that "a natural-gas company" may charge for its gas sales to its resale customers only that rate on file with the Power Commission, the ultimate consumers of Mississippi now can obtain through their state rate fixing bodies all that they ever could gain—exactly as though a stay had not been granted in the Interstate rate case and as though Mississippi had

---

<sup>1</sup> In this connection it should be noted that the Power Commission's own rules provide:

"No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948) Part 154.2, 12 Fed. Register 8598.)

put into effect and passed on to its distributing company customers the benefits of the wholesale price it paid to Interstate immediately upon the Power Commission's rate determination. So it is apparent that Mississippi's ultimate consumers have gained all that they are entitled to gain no matter what is the outcome of the several petitions for certiorari filed in this matter. It cannot be contended, therefore, that questions as to the rights of such ultimate consumers of Mississippi are any longer justiciable. A supervening fact which renders a question moot may be considered by your Honorable Court in determining the right to review. (*Public Utilities Commission of Ohio v. United Fuel Gas Company, et al.*, 317 U. S. 456, 466.)

In addition, it has been pointed out in the response of Interstate to the several petitions in this matter that the Power Commission no longer has any interest in this proceeding. The argument presented in that matter in the Interstate brief is adopted hereby by Mississippi. As a further determinative, however, Mississippi points out that in so far as the Power Commission has a standing to seek review on behalf of ultimate consumers of Mississippi (which standing Mississippi hereby denies), again there is no interest so to be represented because the interests of such ultimate consumers have been merged in the stipulation and satisfied in the Commission prescribed rate which gave effect to the Interstate rate order to the fullest extent of Power Commission jurisdiction.



## II.

### Merits

As to questions of the right of any claimant to the fund in court in view of the equitable factors and discretion in management involved, Mississippi adopts generally the argument contained in the opposition brief filed on behalf of Interstate. Certain considerations, however, have peculiar significance in so far as Mississippi is concerned.

#### a. Only Legal Rates Have Been Charged.

Mississippi because of the posture of its rate situation has charged nothing but the only legal and effective rates it could charge during the whole of the impoundment period. It has been pointed out above (see footnote 1) that under the applicable law only those rates on file with the Power Commission can be charged by a "natural-gas company". And there is no question but what Mississippi has charged only the filed or Power Commission prescribed rates. Pursuant to the Power Commission rate order against it, Mississippi filed the new rates and did not seek a stay of the Commission's order pending the successful review thereof. (Stipulations, Appendices "A" and "B"). The controversy after remand was settled by stipulation as aforesaid. All contentions, therefore, that a stigma of illegality has attached to Mississippi rates are entirely without foundation. The rate determinations of the Commission and the rate previously filed pursuant to its rules had the effect of legislation, and as a result thereof was a protection to Mississippi (see *Arizona Grocery Company*

*v. Atchison, Topeka & Santa Fe Railway Company, et al.*, 284 U. S. 370, 386-388).

Since the Federal Power Commission has no reparation authority (*Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618) and since Mississippi, in any event, charged only what it could charge under the applicable law, there would appear to be no question as to its right to the part of the total fund contributed by it whether accruing or paid before or after the effective date of the Power Commission's rate order in the Mississippi rate investigation.

#### **b. The State Regulatory Function.**

It is apparent from the record in this case that since this Court's decision in *Panhandle Eastern Pipe Line Company v. Public Service Commission* (332 U. S. 507) the Illinois Commission and the Missouri Commission have instituted proceedings to determine whether direct sales made by Mississippi in the States of Illinois and Missouri are subject to the jurisdiction of those commissions (R. 74-75). It is not known what the outcome of these proceedings will be. It is not known, nor has the Court below been advised, as to the extent of the authority of these two state commissions in the matter of awarding reparations in the event that said state commissions are presently authorized by applicable state law to regulate Mississippi's direct sales.

Since the decision by your Court in the *Panhandle* case (*Supra*) it is clear that where a natural gas company is making direct sales, its functions in such respect are state regulable and without any inhibitions from either the Federal Constitution or the Federal Natural Gas Act. Therefore, if the Court below is to hand out Mississippi's contri-

butions to the fund now in dispute, it would be engaging in a function reserved to the states and, in fact, would be engaging in local regulation. It cannot be determined where the gas which Mississippi purchases from Interstate finally ends and impossible to know what percentage, if any, of such gas actually was delivered by Mississippi to customers in Illinois and Missouri (R. 88, 95-96). Faced with this situation, it would be utterly impossible for the Court below in the administration of the fund to give to each ultimate consumer any portion of the funds without engaging in the rate making function of allocation (see *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, 590).

In the brief filed by Interstate the implications of engaging in such rate making function are set forth more fully and the discussion contained therein is hereby adopted. The whole question of this rate making function is peculiarly applicable to Mississippi because of the fact that it presently is faced with a possibility of state regulation of its direct sales and may well face inquiry into the reasonableness of its back rates and, assuming statutory authority therefor exists, possibly face reparation liability in respect thereof over and above any awards made from the fund by the Court below. On the other hand, it may be determined that its direct sale rates are reasonable and that no reparations, assuming reparation authority of the state commissions, are due on account of past rates. In the latter case, Mississippi would then have been deprived of the portion of the fund by a Federal Court in respect of a state matter which by proper state authority will have been held not to be due and owing.

**c. The Portion of the Fund Accumulated Before the Mississippi Rate Order,**

The claims of all Petitioners are to the total amounts in the fund without regard to whether these amounts have been paid in by Mississippi before or after January 20, 1946 (the effective date of the Power Commission rate order against it). As to the amounts paid by Mississippi after January 20, 1946, there would appear to be no question that since it has under the aegis of the Power Commission given effect to the lower Interstate rate in respect of its resale customers, that Mississippi is entitled thereto. As to the amount accumulated before such date, Mississippi was collecting from all resale customers the only legally effective rates which it could charge, as has been pointed out above. Now to require Mississippi to return the amounts deposited prior to January 20, 1946 would not only be tantamount to the Power Commission awarding reparations which in the *Hope* case was held to be beyond its jurisdiction, but also would require the Court below to enter into the nonjudicial function of determining the reasonableness of all of Mississippi's rates from the time impoundment began and without regard to the question of whether Mississippi might later be charged or benefited by the orders of a competent state regulatory agency.

All cases, even remotely relevant, cited by Petitioners are distinguishable in the case of Mississippi because either the regulatory agency involved had complete jurisdiction over all of the sales of the industry involved or had such reparation authority as to give rise to a continuing claim for past damages (Cf. *United States v. Morgan*, 307 U. S. 183).

Viewed realistically, the situation in reference to Mississippi is as follows:

Beginning in June 1943, it was compelled by the operation of the stay order to continue paying to Interstate the same amounts for gas that it had paid previous to the Power Commission rate order against Interstate. It was not until January 20, 1946 that any determination had been made effective in respect of the reasonableness of Mississippi's resale rates. On such date Mississippi effected the lower rates, subject to court review. Since that time such review has been had and by rates now on file with the Commission, the reduction in price of Interstate gas to Mississippi has been passed on in accordance with the Power Commission's order accepting such rates for filing. Had no stay been granted in the Interstate case, Mississippi would have been entitled to keep all of the money represented by the difference between the old Interstate rate and the Power Commission prescribed Interstate rate. It would have been perfectly legal and proper for it to have done so. How then can it be said that it would not now be legal, proper and equitable for Mississippi to have turned over to it its aliquot portion of the fund? The answer is that in justice and equity Mississippi is entitled to its share in the fund. (See *Atlantic Coast Line Railroad Company v. Florida*, 295 U. S. 301, 309-311.)

**d. *Central States Electric Company v. City of Muscatine* (324 U. S. 138).**

All petitioners are erroneously assuming that the court below decided this case solely upon the authority of the *Central States* case (*Supra*). In the brief in opposition filed on behalf of Interstate, it is pointed out that the court



below did not decide this matter solely in reliance upon the *Central States* case. To the extent therein set forth, Mississippi adopts the argument of Interstate. This matter, however, is labored particularly hard in the brief in support of the petition of the Illinois Commission. Mississippi is constrained, therefore, to answer the contentions set forth therein.

(i) The Illinois Commission contends that in this case, but not in the *Central States* case, the immediate purchasers are themselves "natural-gas companies" whose sales are not subject to state regulation (Illinois Commission brief, pp. 12-17). The Illinois Commission overlooks the important fact that in the case at bar the funds accumulated represent not only amounts paid for the purchase of gas for sales which are federally regulable, but also represent money collected for sales which have been held by this Court to be regulable by the states, assuming that the states have given to their proper administrative agencies the necessary authority to do so. *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U. S. 507. Therefore, for the court below to have handed out the fund without regard to this fact would have necessitated either ignoring the possible jurisdiction of state agencies in the premises or determination of questions of state law.

(ii) The Illinois Commission next contends that in the case at bar, but not in the *Central States* case, Mississippi was receiving at least a fair return. (Illinois Commission brief, pp. 17-18). It nowhere appears in the case at bar that Mississippi was earning a fair return upon the whole of its business. The only determination of a fair return was effective as of January 20, 1946, and this determination

in no wise related to the question of fairness of return upon the company's direct industrial business which is regulable, if at all, by the states.

(iii) The Illinois Commission contends that in the case at bar, but not in the *Central States* case the stay order provided that the funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act." (Illinois Commission brief, pp. 19-21). This provision in the court's order did not bind it to return the funds only to one class or to one group. In exercising its equity powers the court below "entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity \* \* \*." *United States v. Morgan*, 307 U.S. 183 at 194.

(iv) Finally, the Illinois Commission contends that it is important for this court to determine whether the decision in the *Central States* case should be extended to the situation presented in the case at bar. (Illinois Commission brief, pp. 21-22). In the brief filed in opposition by Interstate it is pointed out that the decision of this case turns upon principles of law and equity which do not arise from the *Central States* case alone. Therefore, this case and the *Central States* case do not present a matter to be settled by this court. The principles upon which the court below decided this case are justifiable and proper from principles enunciated by this Honorable Court many times. (See Interstate brief in opposition, pp. 9 et seq.).

### Conclusion.

As to Mississippi, it is respectfully submitted that the situation is clear and that its ultimate consumers are in position to obtain through action of appropriate state agencies all of the benefits to which they are entitled. It has given effect to the Interstate reduction for the total period of time during which there was impoundment and a definitive Power Commission order was operative against it. Prior to that time, it collected for its gas only the rates which were the legally allowable and required rates. By effecting a rate with the express approval of the Power Commission applicable to that portion of the impoundment period occurring from the time of the definitive Mississippi rate order to the time new rates were collected by Interstate, Mississippi has passed on all benefits which it possibly could pass on and still not give what might properly be called a rebate. If the the petitioners are contending that Mississippi should give up all of its share in the Interstate fund from the time impoundment began until it ceased, without regard to when the Mississippi rate order was effective, the result would be that Mississippi would be giving up more than it would have given up had no stay been granted in the Interstate case. This is clear when it is realized that had no stay been granted in the Interstate rate case, Mississippi would immediately have had the benefit of the lower Interstate rate without liability to make reparations under the Natural Gas Act, while up to January 20, 1946, it could charge only its rate on file with the Power Commission. Thus, it is clear that Mississippi has not benefited from the stay order and that through the medium of state commissions and distributing companies, ultimate

consumers in Missouri and Illinois will benefit to the limits allowed in the Natural Gas Act. As to Mississippi, therefore, there is nothing before the Court.

Respectfully submitted,

WILLIAM A. DOUGHERTY

JAMES LAWRENCE WHITE  
Attorneys for Mississippi River  
Fuel Corporation.

**Appendix A**

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1948.

No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

**STIPULATION FOR ADDITION TO RECORD.**

It is hereby stipulated and agreed by and between counsel for the Missouri Public Service Commission, Petitioner herein, and counsel for Mississippi River Fuel Corporation, one of the Respondents herein, as follows:

The Court may consider all of the facts set forth herein as an addendum to the Record in its consideration of the petition for certiorari, such facts being as follows:

1. The petition on pages 6 and 7 states as follows:

"Mississippi River Fuel Corporation is the pipe line which purchased gas from the Interstate Natural Gas Company, Incorporated, and resold it at wholesale in Missouri. During the impoundment period the Federal Power Commission issued an order requiring Mississippi to reduce its wholesale rates for gas, and in that order of the Federal Power Commission, there was a provision that if the Commission's order in the *Interstate Natural Gas Company* case was upheld, Mississippi should further reduce its rates by the amount withheld."



The order reducing rates of Mississippi was entered in Docket G-462 and the reduced rates were ordered effective for all billings made after January 20, 1946. Said order was affirmed in part and reversed in part by the United States Circuit Court of Appeals for the District of Columbia. (*Mississippi River Fuel Corporation v. Federal Power Commission*, 163 Fed. 2d 433.)

2. The order of the Circuit Court herein was entered May 12, 1947, rehearing denied July 28, 1947. Subsequent thereto a stipulation was entered into by and between counsel for the Federal Power Commission and counsel for Mississippi as follows:

“UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

“IN THE MATTER

of

MISSISSIPPI RIVER FUEL CORPORATION,  
et al.

Docket  
No. G-462.

“STIPULATION SETTLING AND DISMISSING PROCEEDING  
IN SO FAR AS IT PERTAINS TO  
MISSISSIPPI RIVER FUEL CORPORATION

“In 1943, the Federal Power Commission, herein-after referred to as ‘Commission’, entered orders under the Natural Gas Act instituting an investigation of the reasonableness of all the rates subject to the Commission’s jurisdiction then being charged by Mississippi River Fuel Corporation, hereinafter referred to as ‘Corporation’, and other respondents.

“After hearings in the proceedings, confined to the rates of Corporation and without prejudice to the in-

Investigation of other respondents, the Commission on November 9, 1945 issued an opinion and order (3 F. P. C. 340) in the proceedings directing Corporation to reduce the rates charged and received for the transportation and sale of natural gas by Corporation in interstate commerce to its utility customers for resale for ultimate public consumption.

"Subsequent to the date of the issuance of the Commission's order of November 9, 1945 Corporation filed with the Commission supplements to its then effective rate schedules making the reduction in rates and charges ordered by the Commission. These supplements were to be effective for all bills based on meter readings made after January 20, 1946.

"As finally accepted for filing by the Commission, by order in this Docket No. G-462 dated April 22, 1947, said schedules contained a statement as follows:

'Mississippi River Fuel Corporation (herein called Seller) is filing in the United States Circuit Court of Appeals a petition to review the Order of the Federal Power Commission entered November 9, 1945, as amended November 30, 1945, in Docket No. G-462, reducing rates of Seller. Accordingly, the filing of this supplement is not done voluntarily but is made under protest and solely because of the compulsion of said Order, and to avoid penalties which might be incurred in the event of a refusal to comply therewith. Seller reserves all rights against the Purchasers of natural gas under the schedules to which the following provisions are filed as a supplement, to collect the rates and charges contained in said schedules (after due credit for the amount paid under this supplement) in the event said Order of November 9, 1945, as amended November 30, 1945, is modified or set aside by final court decree. Until said final court decree, all gas delivered to the Purchaser by Seller shall be billed at the rates and under the terms and conditions herein set forth. Seller

also will furnish the Purchaser with a monthly statement of the amount computed on the rates in effect prior to the filing of this Supplement,

which statement was permitted to remain in said schedules without approval or disapproval by the Commission and solely as a means of notification to the public in general and to the customers of Corporation of the rights claimed by Corporation, and without prejudice to the right of the Commission to take such further action with respect to Corporation's rates and charges as the facts in law may permit or require.

"Subsequently the order reducing Corporation's rates was affirmed in part, and reversed in part, and the case remanded for further proceedings in accordance with the opinion by the United States Court of Appeals for the District of Columbia (Case No. 9181) decided May 28, 1947, petition for rehearing overruled July 28, 1947.

"The order reducing Corporation's rates also provided that when the order of the Commission reducing rates of Interstate Natural Gas Company, Incorporated, in Dockets G-149 and G-132 became validated by the Courts, Corporation should pass on the proper portion of that reduction to customers purchasing gas for resale. Such order was upheld by the Supreme Court of the United States, and the funds impounded with the United States Circuit Court of Appeals for the Fifth Circuit in that action have been ordered distributed to Corporation.

"During the interval from January 20, 1946 to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

“In view of these circumstances and the prospect of further increasing costs and changes in methods of operations, it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

“Wherefore, for the purpose of settling and terminating the proceedings in this matter in so far as it pertains to Corporation, it is hereby stipulated and agreed by and between counsel for the Commission and counsel for the Corporation as follows:

“Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946 through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of \$1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing thereafter having a net monthly rate for firm gas composed of a demand component of \$1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and

a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries.

"The rates and charges specified for the period from January 21, 1946 through and including the month of September 1947 reflect and give effect to the reduction in rates of Interstate Natural Gas Company, Incorporated, for that period. While usually treated as a commodity cost, the reduction in this instance is given effect by reflecting it in the demand charge as above set forth.

"This stipulation is subject to the approval of the Commission, and upon approval by the Commission, the Commission agrees that it will dismiss the proceeding before it docketed as *In the Matter of Mississippi River Fuel Corporation, et al.*, Docket No. G-462, in so far as it pertains to Corporation.

May 4, 1948

/s/ BRADFORD ROSS  
General Counsel Federal  
Power Commission  
Attorney for Federal  
Power Commission

April 21, 1948

/s/ WILLIAM A. DOUGHERTY  
Attorney for Mississippi  
River Fuel Corporation

Approved by the Federal Power Commission on May 4, 1948.

/s/ LEON M. FUQUAY  
Secretary"

3. Pursuant to said stipulation rate schedules were filed to carry out the terms thereof and an order was



entered by the Federal Power Commission on July 20, 1948  
as follows:

“UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

“Before Commissioners:

Nelson Lee Smith,  
Chairman;  
Thomas C. Buchanan,  
Claude L. Draper,  
Leland Olds, and  
Harrington Wimberly.

July 20, 1948.

“IN THE MATTER

of

MISSISSIPPI RIVER FUEL CORPORATION,  
*et al.*

Docket  
No. G-462.

FINDINGS AND ORDER ACCEPTING THE FILING OF  
SUPPLEMENTAL RATE SCHEDULES AND  
TERMINATING PROCEEDING.

“Upon consideration of the orders previously entered in this proceeding and the stipulation entitled ‘Stipulation Settling and Dismissing Proceeding in so far as it pertains to Mississippi River Fuel Corporation’ entered into by the General Counsel for the Commission and Counsel for Mississippi River Fuel Corporation (‘Mississippi’),

“The Commission *finds* that:

(1) On January 18, 1946, Mississippi tendered supplements to its then effective rate schedules for

filing in purported compliance with the requirements of the Commission's orders of November 9, 1945, and November 30, 1945, which supplements were rejected, and on August 6, 1946, Mississippi submitted revised supplements to the then effective rate schedules which were accepted for filing by order issued September 30, 1946, as modified by order issued April 22, 1947, subject to the conditions and reservations in said order set forth, and Mississippi has been collecting the rates and charges therein provided for all gas sold in interstate commerce for resale as to all bills based on meter readings made after January 20, 1946.

(2) The 'Stipulation Settling And Dismissing Proceeding In So Far As It Pertains To Mississippi River Fuel Corporation' entered into by the General Counsel for the Commission and counsel for Mississippi and approved by this Commission on May 4, 1948, provides in part as follows:

'During the interval from January 20, 1946, to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

'In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company cus-

tomers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

Wherefore, for the purpose of settling and terminating the proceedings in this matter insofar as it pertains to Corporation, it is hereby stipulated and agreed by and between Counsel for the Commission and Counsel for the Corporation as follows:

Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946, through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of \$1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing thereafter having a net monthly rate for firm gas composed of a demand component of \$1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries.

(3) On July 8, 1948, Mississippi tendered for filing with the Commission new schedules of rates and charges supplementary to the presently effective rate schedules which contain the rates and charges provided for in said stipulation and are to be effective upon the dates and for the periods therein specified. Therefore, the Commission orders that:

(A) The Commission's approval on May 4, 1948, of said stipulation entered into by and between the General Counsel for the Commission and counsel for Mississippi be and the same hereby is confirmed.

(B) The schedules of rates and charges tendered for filing by Mississippi are accepted as being in full compliance with the stipulation heretofore referred to and the supplements listed in Appendix A hereto shall be effective for all bills based on meter readings made after January 20, 1946, and the supplements listed in Appendix B hereto shall be effective for all bills rendered in October 1947 and continuing thereafter (and shall be effective as to Mississippi's Rate Schedule FPC No. 26 from and after November 27, 1947, as indicated in said Appendices A and B) in accordance with the terms of said stipulation.

(C) This order is without prejudice to any findings or orders which have been made or may hereafter be made by this Commission in any proceeding now pending or hereafter instituted by or against Mississippi River Fuel Corporation.

(D) This proceeding in so far as it pertains to Mississippi hereby is declared to be terminated and dismissed.

"By the Commission.

/s/ Leon M. Fuquay  
Secretary

"Date of Issuance: July 20, 1948"

[Appendices A and B refer only to rate schedule designations in the Commission files for the applicable periods and have been omitted herefrom.]

4. Pursuant to said rate schedules a settlement has been made of all amounts due Mississippi from each utility distributing company in Missouri and each such company has received in the rate settlement its proportionate share of the reduction to Mississippi resulting from the Commission order reducing rates of Interstate Natural Gas Company for the period of January 21, 1946 through September 1947. Said utility companies are in the process of passing on to the ultimate consumers the reduction in the rates of Mississippi which includes and gives effect to the reduction in rates of Interstate Natural Gas Company for the period of January 21, 1946 through September 1947.

5. To the extent that the petition seeks distribution to ultimate consumers of the proportionate part of the impounded funds for the period of January 21, 1946 through September 1947, this case has become moot and there is presented herein only the question of whether the Circuit Court's order as it relates to the period prior to January 1946 should be reviewed.

Entered this 25 day of August, 1948..

/s/ JOHN P. RANDOLPH  
Counsel for  
Missouri Public Service Commission

/s/ JAMES LAWRENCE WHITE  
Counsel for  
Mississippi River Fuel Corporation



**Appendix B.**

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
 OCTOBER TERM, 1948.

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 No. 212.
 

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 ILLINOIS COMMERCE COMMISSION, *et al.*
*v.*

 INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*


---

**STIPULATION FOR ADDITION TO RECORD.**

It is hereby stipulated and agreed by and between counsel for the Illinois Commerce Commission, Petitioner herein, and counsel for Mississippi River Fuel Corporation, one of the Respondents herein, as follows:

The Court may consider all of the facts set forth herein as an addendum to the Record in its consideration of the petition for certiorari; such facts being as follows:

1. The petition on pages 5 and 6 states as follows:

"The present petitioner, Illinois Commerce Commission, and other administrative agencies of other States and Cities, also were permitted to and did intervene (R. 21-41, 67, 68-71, 81-87, 92-95). They and the Commission urged, in opposition to the claims of the four purchasing companies, that the *Central States* decision was not controlling and that the funds in question should be distributed equitably among the ultimate consumers of the gas, from whom

such funds had originally been collected, and should not be paid over to the immediate purchasers, who had acted but as intermediaries in the entire transaction of furnishing natural gas to the public. It was also pointed out and urged that the said four immediate purchasers were themselves 'natural gas companies' within the scope of the Natural Gas Act, whose rates for transportation and sale at wholesale were not subject to local regulation, and that the various voluntary rate reduction orders entered during the impoundment period showed that these four companies had been and were still earning not less than a reasonable rate of return on their interstate business, without the benefit (windfall) of the impounded excess.' The petition of Illinois Commerce Commission also alleged in detail that a portion of the funds in the custody of the court had originally been contributed by consumers of gas public utility services in the State of Illinois and paid, in the form of rates for such service, to two local Illinois public utility companies under its jurisdiction and control, namely, the Illinois Power Company, and the Union Electric Power Company, of Illinois; and that the natural gas so consumed and paid for by the said Illinois consumers was gas furnished by Interstate through the facilities of Mississippi, which latter corporation acted only as an intermediary which had resold such gas to the aforesaid two Illinois public utilities which had resold it to Illinois consumers. It also tendered the assistance of its technical staff in formulating a plan for the distribution of such funds to the ultimate consumers and pointed out that such distributions to the ultimate consumers has successfully been effected in previous cases such as *Natural Gas Pipeline Company, Colorado Interstate Gas Company and Panhandle Eastern Pipe Line Company* (R. 68-69)."

The order reducing rates of Mississippi was entered in Docket G-462 and the reduced rates were ordered effective for all billings made after January 20, 1946. Said order was affirmed in part and reversed in part by the United States Court of Appeals for the District of Columbia (*Mississippi River Fuel Corporation vs. Federal Power Commission*, 163 Fed. 2d. 433).

2. The order of the Court of Appeals herein was entered May 12, 1947, rehearing denied July 28, 1947. Subsequent thereto a stipulation was entered into by and between counsel for the Federal Power Commission and counsel for Mississippi as follows:

“UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

“IN THE MATTER

of

MISSISSIPPI RIVER FUEL CORPORATION,  
et al.

Docket  
No. G-462.

“STIPULATION SETTLING AND DISMISSING PROCEEDING  
IN SO FAR AS IT PERTAINS TO  
MISSISSIPPI RIVER FUEL CORPORATION

“In 1943, the Federal Power Commission, hereinafter referred to as ‘Commission’, entered orders under the Natural Gas Act instituting an investigation of the reasonableness of all the rates subject to the Commission’s jurisdiction then being charged by Mississippi River Fuel Corporation, hereinafter referred to as ‘Corporation’, and other respondents.

"After hearings in the proceedings, confined to the rates of Corporation and without prejudice to the investigation of other respondents, the Commission on November 9, 1945 issued an opinion and order (3 F. P. C. 340) in the proceedings directing Corporation to reduce the rates charged and received for the transportation and sale of natural gas by Corporation in interstate commerce to its utility customers for resale for ultimate public consumption.

"Subsequent to the date of the issuance of the Commission's order of November 9, 1945 Corporation filed with the Commission supplements to its then effective rate schedules making the reduction in rates and charges ordered by the Commission. These supplements were to be effective for all bills based on meter readings made after January 20, 1946.

"As finally accepted for filing by the Commission, by order in this Docket No. G-462 dated April 22, 1947, said schedules contained a statement as follows:

"Mississippi River Fuel Corporation (herein called Seller) is filing in the United States Circuit Court of Appeals a petition to review the Order of the Federal Power Commission entered November 9, 1945, as amended November 30, 1945, in Docket No. G-462, reducing rates of Seller. Accordingly, the filing of this supplement is not done voluntarily but is made under protest and solely because of the compulsion of said Order, and to avoid penalties which might be incurred in the event of a refusal to comply therewith. Seller reserves all rights against the Purchasers of natural gas under the schedules to which the following provisions are filed as a supplement, to collect the rates and charges contained in said schedules (after due credit for the amount paid under this supplement) in the event said Order of November 9, 1945, as amended November 30, 1945, is modified or set aside by final court decree. Until said final court

decree, all gas delivered to the Purchaser by Seller shall be billed at the rates and under the terms and conditions herein set forth. Seller also will furnish the Purchaser with a monthly statement of the amount computed on the rates in effect prior to the filing of this Supplement.'

which statement was permitted to remain in said schedules without approval or disapproval by the Commission and solely as a means of notification to the public in general and to the customers of Corporation of the rights claimed by Corporation, and without prejudice to the right of the Commission to take such further action with respect to Corporation's rates and charges as the facts in law may permit or require.

"Subsequently the order reducing Corporation's rates was affirmed in part, and reversed in part, and the case remanded for further proceedings in accordance with the opinion by the United States Court of Appeals for the District of Columbia (Case No. 9181) decided May 28, 1947, petition for rehearing overruled July 28, 1947.

"The order reducing Corporation's rates also provided that when the order of the Commission reducing rates of Interstate Natural Gas Company, Incorporated, in Dockets G-149 and G-132 became validated by the Courts, Corporation should pass on the proper portion of that reduction to customers purchasing gas for resale. Such order was upheld by the Supreme Court of the United States, and the funds impounded with the United States Circuit Court of Appeals for the Fifth Circuit in that action have been ordered distributed to Corporation.

"During the interval from January 20, 1946 to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas dis-



tribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

"In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

"Wherefore, for the purpose of settling and terminating the proceedings in this matter in so far as it pertains to Corporation, it is hereby stipulated and agreed by and between counsel for the Commission and counsel for the Corporation as follows:

"Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946 through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of \$1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing

thereafter having a net monthly rate for firm gas composed of a demand component of \$1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries.

The rates and charges specified for the period from January 21, 1946 through and including the month of September 1947 reflect and give effect to the reduction in rates of Interstate Natural Gas Company, Incorporated, for that period. While usually treated as a commodity cost, the reduction in this instance is given effect by reflecting it in the demand charge as above set forth.

"This stipulation is subject to the approval of the Commission, and upon approval by the Commission, the Commission agrees that it will dismiss the proceeding before it docketed as *In the Matter of Mississippi River Fuel Corporation, et al.*, Docket No. G-462, in so far as it pertains to Corporation.

May 4, 1948

/s/ BRADFORD ROSS  
General Counsel Federal  
Power Commission  
Attorney for Federal  
Power Commission

April 21, 1948

/s/ WILLIAM A. DOUGHERTY  
Attorney for Mississippi  
River Fuel Corporation

Approved by the Federal Power Commission on May  
4, 1948.

/s/ LEON M. FUQUAY  
Secretary"

3. Pursuant to said stipulation rate schedules were filed to carry out the terms thereof and an order was entered by the Federal Power Commission on July 20, 1948 as follows:

“UNITED STATES OF AMERICA,  
FEDERAL POWER COMMISSION

“Before Commissioners:

Nelson Lee Smith,  
Chairman;

Thomas C. Buchanan,  
Claude L. Draper,  
Leland Olds, and  
Harrington Wimberly.

July 20, 1948

“IN THE MATTER  
of  
MISSISSIPPI RIVER FUEL CORPORATION,  
*et al.*

Docket  
No. G-462.

“FINDINGS AND ORDER ACCEPTING THE FILING OF  
SUPPLEMENTAL RATE SCHEDULES AND  
TERMINATING PROCEEDING.

“Upon consideration of the orders previously entered in this proceeding and the stipulation entitled ‘Stipulation Settling and Dismissing Proceeding In So Far As It Pertains to Mississippi River Fuel Corporation’ entered into by the General Counsel for the Commission and Counsel for Mississippi River Fuel Corporation (‘Mississippi’),

"The Commission finds that:

(1) On January 18, 1946, Mississippi tendered supplements to its then effective rate schedules for filing in purported compliance with the requirements of the Commission's orders of November 9, 1945, and November 30, 1945, which supplements were rejected, and on August 6, 1946, Mississippi submitted revised supplements to the then effective rate schedules which were accepted for filing by order issued September 30, 1946, as modified by order issued April 22, 1947, subject to the conditions and reservations in said order set forth, and Mississippi has been collecting the rates and charges therein provided for all gas sold in interstate commerce for resale as to all bills based on meter readings made after January 20, 1946.

(2) The 'Stipulation Settling And Dismissing Proceeding In So Far As It Pertains To Mississippi River Fuel Corporation' entered into by the General Counsel for the Commission and counsel for Mississippi and approved by this Commission on May 4, 1948, provides in part as follows:

'During the interval from January 20, 1946, to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

'In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been

and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

Wherefore, for the purpose of settling and terminating the proceedings in this matter in so far as it pertains to Corporation, it is hereby stipulated and agreed by and between Counsel for the Commission and Counsel for the Corporation as follows:

Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946, through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of \$1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing thereafter having a net monthly rate for firm gas composed of a demand component of \$1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries.

(3) On July 8, 1948, Mississippi tendered for filing with the Commission new schedules of rates and charges supplementary to the presently effective



rate schedules which contain the rates and charges provided for in said stipulation and are to be effective upon the dates and for the periods therein specified.

"Therefore, the Commission *orders* that:

(A) The Commission's approval on May 4, 1948, of said stipulation entered into by and between the General Counsel for the Commission and counsel for Mississippi and the same hereby is confirmed.

(B) The schedules of rates and charges tendered for filing by Mississippi are accepted as being in full compliance with the stipulation heretofore referred to and the supplements listed in Appendix A hereto shall be effective for all bills based on meter readings made after January 20, 1946, and the supplements listed in Appendix B hereto shall be effective for all bills rendered in October 1947 and continuing thereafter (and shall be effective as to Mississippi's Rate Schedule EPC No. 26 from and after November 27, 1947, as indicated in said Appendices A and B) in accordance with the terms of said stipulation.

(C) This order is without prejudice to any findings or orders which have been made or may hereafter be made by this Commission in any proceeding now pending or hereafter instituted by or against Mississippi River Fuel Corporation.

(D) This proceeding in so far as it pertains to Mississippi hereby is declared to be terminated and dismissed.

"By the Commission.

/s/ LEON M. FUQUAY,  
Secretary

"Date of Issuance: July 20, 1948"

(Appendices A and B refer only to rate schedule designations in the Commission files for the applicable periods and have been omitted herefrom.)

Entered into this 3rd day of September, 1948.

/s/ GEORGE F. BARRETT  
Attorney General of the State of Illinois,  
Attorney for  
Illinois Commerce Commission,  
Petitioner

/s/ JAMES LAWRENCE WHITE  
Counsel for  
Mississippi River Fuel Corporation

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SUPREME COURT U.S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

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No. 109.

FEDERAL POWER COMMISSION et al.

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE  
OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

No. 209.

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

No. 212.

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

---

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit.

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**RESPONSE OF MEMPHIS NATURAL  
GAS COMPANY.**

EDWARD P. RUSSELL,

Twenty-Ninth Floor, Sterick Building,

Memphis, Tennessee,

Attorney for Memphis Natural Gas Company.

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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No. 109.

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v.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit.

**RESPONSE OF MEMPHIS NATURAL  
GAS COMPANY.**

**STATEMENT.**

The events and orders leading to this controversy are accurately stated in the petitions. For brevity's sake they will not be repeated, but are adopted by reference.

The effort of the petitioners in this proceeding for an order directing payment to distributing companies which are customers of the pipe line companies and, in turn, directing the distributing companies to divide the money among ultimate consumers is fundamentally a request that this court undertake judicial legislation. There is no statutory or case law authority to warrant such a request. The petitioners hope to make new case law and to enlarge not only the scope of the Natural Gas Act, but also the scope of the appellate jurisdiction conferred by the Natural Gas Act upon the Circuit Courts of Appeals.

The petitioners request that the court depart from the Act of Congress by assuming greater jurisdiction than conferred. But the extraordinary request is beyond judicial precedent.

Memphis Natural intervened January 26, 1948 (R. 42), and claims \$592,465.82 (R. 110).

As stated in the Memphis Natural intervention petition, it owns and operates a pipe line which originates in Louisiana, passes through Arkansas and Mississippi, and terminates in Tennessee. The gas is transported and sold at wholesale to distributing companies and one industrial customer. Its customers are:

Louisiana Power & Light Company, a distributing company;

Arkansas Power & Light Company, a distributing company;

Mississippi Power & Light Company, a distributing company;

West Tennessee Gas Company, a distributing company;

Light, Gas & Water Division of the City of Memphis, a municipal agency for the distribution of gas, etc.;

Memphis Generating Company, a private corporation, which purchases gas direct for industrial use.

The sales to distributing companies are subject to the Commission's jurisdiction, and direct sales to industrial customers are not subject to its jurisdiction. *Panhandle Eastern P. L. Co. v. Federal Power Commission*, 324 U. S. 635.

The Light, Gas and Water Division of the City of Memphis is our only customer which has filed a certiorari petition. Its petition plainly shows that it has no intention of distributing to ultimate consumers such part of the fund, if any, as it may receive. The idea that ultimate consumers will be benefited if the court gives the relief sought by the petitioners is impractical and fantastic. Our only complaining distributing customer, as shown by its petition, has no intention of dividing the money among the ultimate consumers during the years involved. It intends to pocket the money and call it quits. If, however, Memphis Natural is directed to deliver the money to the distributing companies, there is no way in this proceeding to require the distributing companies to pass along the money to their ultimate consumers during the several past years. The distributing companies are neither parties to this proceeding nor subject to the jurisdiction of the Commission. It therefore is futile to talk in this proceeding about something to be done for ultimate consumers.

The sole question is the identity of the parties from whom the funds were withheld during the stay order. Admittedly the pipe line customers of Interstate would have received the fund but for the stay order. It is difficult to understand how a stay order can change the title to the fund, as contended by petitioners.

This is an attempt to turn the courts into rate-making bodies and thus relieve the Commission of work imposed

by the Act upon the Commission. It is an attempt to make the courts do work far beyond the Congressional intent expressed in the Natural Gas Act. The end result of the petitioners' request is that current rate schedules fixed by the Commission be ignored and the fund distributed in such fashion that the current rate schedules be by-passed. We refer to the rate schedule fixed by the Commission for Interstate and its customers and the rate schedules fixed by the Commission for Interstate's pipe line customers and their distributing company customers. The petitioners' plan in this proceeding is to by-pass all of these rate schedules and in effect cause all of the pipe line companies to violate the schedules by charging more or receiving less than ordered by the Commission. This is the inevitable result of the relief sought by the petitioners. If there is or was anything wrong with these various rate schedules so promulgated by the Commission for the years in question, the Commission had, under the Natural Gas Act, an adequate remedy to correct them. If it has failed to do so, the courts cannot, under the guise of a distribution order, perform the administrative duties of the Commission and become retroactive rate-making bodies. An orderly approach and examination of the Natural Gas Act seems to warrant these statements.

### **LIMIT OF THE COMMISSION'S DUTIES AND JURISDICTION.**

The Commission's petition should be denied as the Act does not give it authority to participate in a contest over the impounded funds. Its duties were performed and its jurisdiction exhausted when the rate reduction order against Interstate became final on October 13, 1947. *Interstate Natural Gas Co. v. Federal Power Commission*, 332 U. S. 785.

The Natural Gas Act, Section 5 (a), 15 U. S. C. A. 717d, "authorizes the Commission after hearing to determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and \* \* \* fix the same by order."

### **LIMIT OF COURT OF APPEALS' DUTIES AND JURISDICTION.**

The Natural Gas Act, Section 19, 15 U. S. C. A. 717r (b), states:

"Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."

The Commission ordered the Interstate rate reduction, the Court of Appeals affirmed and this court later affirmed.

The Act then states in Paragraph 717r (c) that an appeal to the Court of Appeals "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

The Act does not state the manner in which the impounded funds shall be distributed, but leaves the question to the Court of Appeals. The Act does not authorize the Commission or these other petitioners not in privity with Interstate to participate with reference to the distribution of the fund. If this is a correct statement, the petitions should be dismissed as the Act does not authorize the things proposed to be done by the petitioners. The petitioners do not cite any authority in the Natural Gas Act to warrant their intervention. The Act is the limit of the petitioners' rights. It does not confer upon petitioners the rights assumed by them. The petitioners do not profess any such statutory right.



## **ERRONEOUS ASSUMPTION BY PETITIONERS.**

Petitioners have assumed that Interstate's pipe line customers during the years in question earned their allowable returns. Illinois Petition, p. 17. Commission's Petition, p. 14. By implication the petitions admit that the relief sought by them, i. e., an order delivering the fund to ultimate consumers, cannot be expected if the pipe line companies did not earn the allowable returns during the years in question. Memphis Natural did not earn during the years in question its allowable return. The retention by Memphis Natural of the Interstate reduction will result in Memphis Natural earning in 1944 .38 of 1% and in 1945 .33 of 1% in excess of the allowable return and in 1946 .86 of 1% less than the allowable return. The average for the three years is less than the allowable return even if Memphis Natural gets its proper part of the impounded fund. These figures are a matter of record in the Commission's office. The plain fact is that the Memphis Natural rate schedules ordered by the Commission on July 26, 1943, Commission's Petition, p. 15, were wholly inadequate to provide its prescribed allowable return. As stated, Memphis Natural will not exceed the allowable return if it receives its part of the Interstate refund. Aside from any law involved, Memphis Natural is entitled to its part of the money in order to bring it up to the allowable return. It is just as much the duty of the Commission to see that a pipe line company gets a fair return as to protect the public against excessive rates. All of these rate questions will have to be examined in this proceeding if equity is to be done to all parties because it will be highly inequitable to do as proposed by the petitioners, i. e., enter an order of distribution to distributing companies, and, in turn, order them to distribute to ultimate consumers upon the assumption

that the pipe line companies have earned during the years in question a fair or allowable return without inclusion of the Interstate refund. This is not true of Memphis Natural as reflected by the Commission's records. If there had been any doubt about these matters, the Commission could have, at any time during the past years, ordered Memphis Natural or any one of the pipe line companies to show cause why it should not reduce its rates to reflect the Interstate rate reduction. Apparently the Commission thought there was no occasion for such a show cause order.

### **THE COURTS ARE NOT RATE MAKING BODIES.**

**Newton v. Consolidated Gas Co., 258 U. S. 165:**

"Rate making is no function of the courts and should not be attempted, either directly or indirectly."

**Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 183:** Speaking of rates, this court said:

"So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts."

The Natural Gas Act does not give to the courts original rate making jurisdiction, but limits the jurisdiction to a review of the rate orders by the Commission.

**Mississippi Power & Light Co. v. Memphis Natural Gas Company, 162 F. (2) 388 (5 C.):**

"Rate making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function."

**Colorado Gas Co. v. Federal Power Commission, 324 U. S. 581:**

**L. & N. Railroad Co. v. Maxwell, 237 U. S. 94.**

**Bull S. S. Lines v. Thompson, 123 F. (2) 943 (5 C.):**

“Courts may not strike down the plain and unambiguous terms of tariffs set up and approved by the Interstate Commerce Commission.”

If the relief sought by the petitioners is granted, the result will be confusion and a total departure from rate schedules promulgated by the Commission and in effect for the last several years.

If the court delivers the impounded funds to distributing companies, such an order will be tantamount to the creation of a new rate schedule for Interstate and its customers. This necessarily follows, as Interstate has collected for the years in question higher rates from its customers than ordered by the Commission. Unless the overcharges are returned to its customers, a price different from that ordered by the Commission will be collected by Interstate from its customers. Such a result will be a plain violation of the Act and an invasion of the lawful authority of the Commission. The courts have no such original rate-making jurisdiction.

If the pipe line customers of Interstate are by-passed and the funds delivered to distributing companies which are customers of Memphis Natural, there is an additional reason for this being an invasion of the original rate-making jurisdiction of the Commission. The Commission has fixed the rates to be paid by such distributing companies to Memphis Natural. Receipt by the distributing companies of the impounded funds will confer upon them for the years in question a lower rate than fixed by the Commission in the Memphis Natural rate schedules.

The courts have no jurisdiction to enter any kind of order which will affect, directly or indirectly, the contract price to be paid Memphis Natural by a direct industrial

customers, as said sales are excluded by express language of the Act from Federal regulation.

Neither the Federal courts nor the Commission have jurisdiction to direct a distributing company to pass along to ultimate consumers any part of the funds, as intrastate sales are subject solely to the jurisdiction of the local regulatory bodies.

If the court by-passes the pipe line customers of Interstate, such act will constitute rate-making; as all of the rate schedules on file with the Commission and applicable to Interstate, applicable to its pipe line customers, and applicable to the customers of the pipe line companies will be violated. Such act will in substance be a reparation order. Admittedly, not even the Commission has power to enter such an order. It has no power to make a retroactive rate order, as this is expressly forbidden by the language of the Act. It therefore follows that the Commission cannot by circumvention and indirection accomplish by an intervention petition in this proceeding some objective prohibited by the Act.

### **THE IMPOUNDING ORDER.**

The stay order by the Court of Appeals, on June 14, 1943, is relied upon by petitioners to bolster their claims. Because the order mentioned "ultimate consumers" (R. 2), it is argued that the stay order was, in effect, a recognition or adjudication that they are the owners of the fund. But no such interpretation is warranted as the order plainly expresses the intent to reserve judgment as to the parties to receive the fund. It states that money will be "returned to such ultimate consumers of gas, or other parties to whom the court shall find the same shall be returned," etc.

The pipe line customers of Interstate were not parties to the proceeding at that time and are not bound by the

language. It is obvious, however, that the court intended to completely reserve judgment as to the distribution of the fund and did not intend to suggest at that time the parties ultimately entitled to the fund.

The Court of Appeals has now found that the pipe line companies are "the other persons to whom" the money shall be returned. We respectfully submit that the petitions should be denied, otherwise the courts will be in the role of rate-making bodies with all of the attendant burdens incident to such duties.

Respectfully submitted,

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JAN 4 1949

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION, *et al.*

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF FOR INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED.**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

**BRIEF FOR INTERSTATE NATURAL GAS  
COMPANY, INCORPORATED.**

**Opinion Below.**

The opinion of the United States Court of Appeals for  
the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

## Jurisdiction.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-1124). Petitions for writs of certiorari in Nos. 109, 188, 209, and 212 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

## Statement.

Since this brief is to be considered in all of the proceedings (Nos. 109, 188, 209, 212), it is necessary to point out the interest, if any, of each of the petitioners.

The Federal Power Commission ("Commission"), petitioner in No. 109, derives its authority, if any, in the premises from the Natural Gas Act of 1938 (c. 556, 52 Stat. 821, 15 U. S. C. Sec. 717, *et seq.*). The rate case instituted before it was finally determined in its favor by your Honorable Court in *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682 (rehearing denied October 13, 1947, 332 U. S. 785). Commencing with October, 1947, this respondent, Interstate Natural Gas Company ("Interstate"), billed for its gas sales at the Commission prescribed rate (R. 18). Schedules were filed in December, 1947, in compliance with the Commission's order, making the reduced rates effective back to June 15, 1943 (R. 56, 57, 104).

The Public Service Commission of the State of Missouri ("Missouri Commission"), petitioner in No. 188, represents only Missouri consumers receiving gas indirectly from Mississippi River Fuel Corporation ("Mississippi") (R. 92); and the Illinois Commerce Commission ("Illinois

Commission") represents only Illinois consumers receiving gas indirectly from Mississippi (R. 68). The Commission entered a rate order against Mississippi (4 F. P. C. 340) which subsequently was reviewed and remanded by the Court of Appeals for the District of Columbia (163 F. 2d 433) and settled by stipulation on May 4, 1948, which stipulation was adopted by the Commission on July 20, 1948. By said stipulation Mississippi gives effect to that portion of the rate order in the *Interstate* case accruing since January 20, 1946, the effective date of the Power Commission's remanded order against Mississippi. (See Commission brief, p. 56, and Appendices A and B to brief of Mississippi in Opposition to Petitioners for Certiorari.)

The Memphis Light, Gas and Water Division of the City of Memphis, Tennessee ("Memphis"), petitioner in No. 209, purchases its natural gas requirements from Memphis Natural Gas Company ("Memphis Natural"). Memphis is not subject to regulation and it claims a part of the fund awardable to Memphis Natural in its corporate capacity and not for distribution to any consumer in fact (R. 25-26).

While this brief is in response to all of the arguments in Nos. 109, 188, 209 and 212, *Interstate* does not thereby indicate that the cases should be considered jointly. On the contrary, each must sustain its own burden in attempting to reverse the court below.

## SUMMARY OF ARGUMENT.

### I.

An examination of the opinion of the court below will demonstrate that it did not act under any sense of compulsion from *Central States Electric Company v. City of Muscatine*, 324 U. S. 138.

### II.

The issues presented in the several cases at bar are distinguishable from those instances in which a business affected with a public interest has claimed part or all of funds impounded or segregated. This respondent now makes no claim whatsoever to the funds paid into the registry of the court below. In addition, in the authorities which the Power Commission maintains supports its arguments, claims to the funds were being made by those immediately in contact with the particular regulated business which had been found at fault. In no pronouncement of this Court has it been indicated that awards should be made beyond those immediately in contact with the regulated business which has been found guilty of an illegal practice or exaction.

The arguments of the Power Commission apparently pass by the important point that the funds which have been accumulated represent those collected by the three purchasing pipe line companies from both direct and indirect industrial consumers as well as from domestic consumers. It is impossible from the Commission's argument to ascertain whether all "ultimate consumers," including industrial both direct and indirect, or only domestic consumers are to be the object of concern in the distribution of the fund.



### III.

The court below had a large measure of discretion in the management of the fund and disposed of it in the only way which was consistent with its jurisdiction. In order for the court to have made any other disposition of the fund, it would have been necessary for it to have engaged in all of the mechanics of making rates not only as to the unknown portion of the fund which represented revenues from sales regulable under the Natural Gas Act, but also as to the portion of the fund arising from sales which have been declared by this Court to be regulable only by the states. *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U. S. 507. As a matter of fact, the Power Commission itself in the past has recognized that the rights in a fund such as this are in the natural-gas companies making the immediate payment on account of which the funds have been accumulated.

This is not a case in which the Court should be compelled to set up rates and engage in the policy-making functions which are necessary in order to determine rates not only federally regulable but state regulable. This Court should not be placed in the position of ordering the court below to determine what are the proper rate criteria and rate conclusions which the competent states should proclaim. Nor should it be required to engage in what amounts to awarding reparations, contrary to the policy of Congress.

### IV.

No one of the petitioners in these cases is now competent to maintain this review proceeding. The Federal Power Commission is an agency of limited natural gas rate-fixing

authority. It is implicit in the Natural Gas Act itself that the Commission does not have the standing of a representative of ultimate consumers whose interests would adequately be represented by competent state agencies. The two state agencies involved now represent only moot issues since the settlement by the Power Commission of its rate case against Mississippi River Fuel Corporation has given effect to the Interstate reduction to the same extent as though no stay order had ever been entered in the Interstate case. The Memphis Light, Gas & Water Division adopts the arguments of the Power Commission which are premised upon the notion that "ultimate consumers" should be the recipients of the fund. Memphis Light, Gas & Water Division claims, however, that only it is entitled to that portion of the fund represented by the sales to its consumers.

## ARGUMENT.

### I.

#### Introduction.

The argument of the Commission and likewise of all other petitioners herein is directed mainly at the case of *Central States Electric Company v. City of Muscatine*, 324 U. S. 138. It will be the purpose of Interstate to demonstrate that not only did the court below not feel "compelled" to follow the *Central States* case, but that it reached the only proper result under the circumstances.

## II.

### The argument of the Federal Power Commission.

The real problem in this case is not in deciding whether the *Central States* case is applicable; it is a consideration of the applicable and distinguishing facts of this case which makes it different from all others cited by petitioners.

In the first place, this respondent was the company seeking the review to which the impoundment of excess charges was ancillary. This respondent lost its review proceedings and now is desirous of immediate discharge from liability on account of the excess payments during the impoundment period. It justly desires to be free of the exorbitant costs and delays which might be imposed upon it if the mere driplets of the fund were ever to find their way to the so called "ultimate consumers".<sup>1</sup> Interstate has not claimed the fund (R. 103) and hereby disclaims its right to the fund as compensatory for any costs of gas sold. This fact in and of itself distinguishes this case from those in which the company whose rates were attacked or who paid less than the legal rate sought to collect back an illegal rate. See *Inland Steel Co. v. United States*, 306 U. S. 153; *United States v. Morgan*, 307 U. S. 183; *Ex parte Lincoln Gas and Electric Co.*, 256 U. S. 512.

In all of the rate cases cited by the Commission the fund was claimed by or for the persons who had to pay the illegal rate pending review. Here only the pipe line companies to

<sup>1</sup> The comparatively small amounts which "ultimate consumers" would be entitled to is evident from the data at page 30 of the Record which shows amounts allegedly allocable to distribution companies. These companies in turn would have to allocate to their customers. Interstate provided only a small portion of each of its immediate customers' total needs (R. 36-37, 88, 95).

which award was made below paid this respondent's illegal rate. The policy of these cases was that the company exacting the rate or charge successfully attacked should not benefit from the fact that a stay had been granted. This respondent will not so benefit by the action of the court below. The Commission cites *Ex parte Lincoln Gas and Electric Company* (256 U. S. 512) "as particularly relevant" on the point that the fact of no privity between Interstate and "ultimate consumers" is not important. That case did not treat of lack of privity in the sale of gas to the citizens but on the basis that a municipal corporation was representative of its citizens. The illegal rate was exacted from these citizens and not from the representative party. The question was one only of whether there was privity in the litigation. The case has no applicability on the point for which it is cited.

In no case has award been made or indicated beyond the point of immediate contact with the one whose rate or benefit has been declared unreasonable. For instance: in *Inland Steel Co. v. United States* (*supra*), no award was made to other shippers because they had to pay greater amounts because of a discriminatory practice in reimbursement for spotting cars; in *United States v. Morgan* (*supra*) the question was "whether upon a redetermination of that issue [reasonableness of rates] by the Secretary the district court will have, and should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them" (307 U. S. at 188). This Court in no wise indicated that those

who dealt with the ones paying the excess charges either immediately or immediately should be the object of concern to the district court. Again in *Atlantic Coast Line Co. v. Florida* (295 U. S. 301) Justice Cardozo refused restitution to shippers who paid a higher rate later reversed instead of a rate still effective but discriminatorily too low and the carrier was allowed to keep interim charges over said rate. There was no award to those who were discriminated against.

To Commission's assertion that "the ultimate consumers are equitably entitled to receive the impounded fund" (Commission brief, p. 21), answer can be made that the equities here in favor of remote parties are no stronger than in the cases discussed above where a fund or a claim arises from a stay order. In fact some of these same cases are cited by the Commission to sustain the quoted point but obviously they fail to do so. In *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.* (249 U. S. 134), also cited on the point by the Commission, the claim was made by a shipper who paid the excess charge—not by any remote party who may have had to pay some indefinite increased costs for the shipper's product. "What was wrongfully done by the process" for which restitution should be made can be definitely determined only with reference to the ones who paid the price to the recipient of the benefits of the stay. To go beyond that point, Interstate will demonstrate, requires those determinations which are policy and rate making in nature.

While the purpose of the Natural Gas Act may have been to protect consumers as indicated in *Federal Power Commission v. Hope Natural Gas Co.* (320 U. S. 581, 610, 612) that act adopted a limited means of accomplishing that end as the majority decided in *Central States (supra)*,

324 U. S. at 144). The fact is that no consumer even has standing before the Commission to complain of a rate. The jurisdiction of the Commission to proceed in a rate case is "upon its motion or upon complaint of any State, municipality, State Commission, or gas distributing company . . . ." (Natural Gas Act, Sec. 5(a), 15 U. S. C. Sec. 717d). This adds nothing to the equities of "ultimate consumers" which the Commission attempts to conjure up in this case. Indeed it is difficult to determine just what the Commission means by "consumers" and "ultimate consumers". While all gas (except that lost through leakage) reaches a consumer some time and the term "consumer" therefore must comprehend *all* who use the gas, the Commission appears to be talking about not consumers generally but "domestic users" (p. 25 and note 9, *id*). This class within a class is lifted from a partial quotation from Justice Jackson's dissent in the *Hope* case. (320 U. S. at 659) and out of text the Commission attempts to warp the sense of the quotation. Justice Jackson there was speaking of awarding the whole of a reduction to domestic users because of discrimination against them. The discrimination Justice Jackson was speaking of arose from the Commission order. The matter is dealt with also in the majority opinion (320 U. S. at 617-618). No such discrimination between the domestic and nondomestic user is involved here. If, however, only domestic users are the possessors of these synthesized equities, the argument becomes self-contradictory. Assuming equities in the consumers, these equities must be in all consumers under sales both regulable (which will include resale industrial gas) and nonregulable by the Commission. Interstate respectfully submits that this is a correct analysis of the Commission's argument on the



question of the equities. It all serves to point up the argument to be made under Part II of this brief that the court below reached the only proper and realistic result and could, and in effect did, do so on grounds other than the *Central States* case. The argument under Part II will answer adequately the remainder of the Commission's contentions in respect of either overruling or distinguishing the *Central States* case.

Before leaving this discussion, two more specific matters must not go unchallenged.

At page 41 of its brief the Commission contends that "The doctrine of the *Central States* case encourages frivolous litigation." It then goes on to recite an affiliation then but not now existing between Interstate and Mississippi River Fuel Corporation as illustrative of this. Naturally since affiliation is no longer present, there will be no shifting of "the amount of reduction from the treasury of one subsidiary to another" (p. 43). But for the Commission to indicate that the doctrine of *Central States* encouraged the review which Interstate had sought indeed imputes remarkable acumen to this respondent since the stay order was entered July 15, 1943 (R. 3), and the *Central States* case was not decided by this Court until February 15, 1945.

The Commission (pp. 44 *et seq.*) also urges that this would be a proper instance in which the Court could overrule *Central States* because it pertains to separation of powers. It is apparent that the policy of the Commission is indirectly to award reparations contrary to the policy of Congress in not granting such power to the Commission or to any body or tribunal in natural gas rate cases. Congress certainly was aware of the fact that it could have granted such power (*Dayton-Goose Creek Railway v.*

*United States*, 263 U. S. 456) so it must be assumed that it did not wish to do so. Interstate respectfully submits therefore that this Court should not now act contrary to this clear congressional policy.

The Commission's final contention relates to a difference in the terms of the stay order entered in the *Central States* case and that entered by the court below. It would seem abundantly clear that the court below was acting or attempting to act in a manner consistent with the policy and terms of the Natural Gas Act. Properly it could take no other course. It is shown in the immediately preceding paragraph that the court attended to this Congressional policy. The stay order itself, however, is by no means conclusive. In exercising its equity powers the court below "entered into no contract or understanding as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity \* \* \*." *United States v. Morgan*, 307 U. S. 183 at 194.

### III.

#### **The order of the court below should be affirmed.**

Since the Commission brief (in which all other petitioners concur) in essence asked that *Central States Electric Company v. Muscatine* (*supra*) be overruled or distinguished and that the funds be awarded to "ultimate consumers" (or, perhaps, just the domestic consumers, the Commission apparently does not know which), it is important to inquire whether the court below was "compelled" as contended by the Commission, to reach its result on the basis of the *Central States* case. Interstate will show that

the result reached was proper without reference to *Central States*.

#### A. What the court below did.

The court below after "A careful consideration of the opposing contentions, in the light of the undisputed facts" (R. 105) felt that its only course was to award to the pipe line companies privity to the contracts with Interstate the amounts which they paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them" (*id.*). The court merely cited the *Central States* case in a footnote and without comment. Thus it is clear that the contentions plus the facts really moved the court to its conclusion. The court did, however, preserve the rights, if any, in the distributive parts of the funds of others by stating that its action was without prejudice to such rights, if any.

Contrary to the erroneous contention of the petitioners here that the court below reached its result under a feeling of compulsion from the *Central States* case, the fact is that the court had the breadth of discretion in the premises given to an equity court of original jurisdiction, (see Illinois Commission Certiorari brief, pp. 22 *et seq.*) and in exercising this discretion it reached a result based upon a proper evaluation of facts, contentions, and equities (see Part "B" sub). Regardless of the dissatisfaction of petitioners with the *Central States* case, however, that case does propound the principle that a federal court as such has no rate fixing authority. 324 U. S. 138, 143. This is no new pronouncement but has been the law for some time. *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264; *Newton v. Consolidated Gas Company*, 258 U. S. 165, 177.

It will be shown that the judgment of the court below was otherwise fully justified without any support from the majority view of the *Central States* case.

**B. The court below could exercise discretion.**

The Natural Gas Act provides for court review (Section 19 (b), 15 U. S. C. Sec. 717r(b)) and means for securing a stay (Section 19 (c), 15 U. S. C. Sec. 717r(c)). It is within the court's discretion whether a stay will or will not be granted. (See *Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment.<sup>2</sup> The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. *Inland Steel Company v. United States et al.*, 306 U. S. 153; *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coast Line Railway Co. v. Florida et al.*, 295 U. S. 301, 309. In that case it was stated:

<sup>2</sup> In *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, this Court, per Stone, J., stated (at 271):

"The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State R. Tax Cases*, 92 U. S. 575; 23 L. ed. 663; *Cummings v. Merchants Nat. Bank*, 103 U. S. 153, 25 L. ed.

"Restitution is not of mere right. It is *ex-gratia*; resting in the exercise of a sound discretion and the court will not order it where the justice of the case does not call for it \* \* \* (*id.* at 316).

The case which best illustrates the breadth of discretion involved is *Inland Steel Company v. United States, et al.* (306 U. S. 153). In that case this Court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that the discretion as to the granting of a stay order with or without conditions is very broad and also in such a way that, along with the authority of *Ford Motor Company v. N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company v. City of Muscatine* (*supra*) that " \* \* \* the federal court which has this fund has considerable discretion in its management. *United States v. Morgan, supra*. I fail to see how it abused its discretion in handing the fund over to the officials."

### C. There was no abuse of discretion by the court below.

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the court

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903; *Peoples Nat. Bank v. Marye*, 191 U. S. 272, 287, 48 L. ed. 180, 187, 24 S. Ct. 68; see *Norwood v. Baker*, 172 U. S. 269, 294, 43 L. ed. 443, 453, 19 S. Ct. 187. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, 77 F. ed. 1208, 1211, 52 S. Ct. 602. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey v. McDonald*, 109 U. S. 150, 157, 27 L. ed. 888, 890, 4 S. Ct. 136, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co. v. Newton* (D. C.), 267 Fed. 231, 273; *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 S. Ct. 264."

exercise its discretion both in respect of applicable facts and applicable law.

### (i) The Fund and Its Origin.

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order. On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which \$1,484,582 is applicable to excess charges to Mississippi River Fuel Corporation; \$688,156 is applicable to excess charges to Southern Natural Gas Company; and \$344,606 is applicable to excess charges to United Gas Pipe Line Company [for account of Memphis Natural Gas Company] from June 15, 1943 to December 10, 1945; and \$247,859 is applicable to excess charges to Memphis Natural Gas Company from December 10, 1945 through September, 1947," represent the difference between the attacked and the prescribed rates (R. 110).

There is no dispute that the above three pipe lines bought gas immediately from Interstate and that they directly paid to Interstate the funds now in dispute (R. 57). The position of petitioners, however, is that the pipe lines paid Interstate the money collected mediately from consumers. How much of this, had the reduction been effective at once, would have stayed in the pipe line companies'



hands is purely speculative and dependent entirely upon the reasonableness of their rates at the times of collection.

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." *Board of Trade v. United States*, 314 U. S. 534 at 546.

The Commission itself recognizes this in its findings to the order accepting Mississippi's proposed new rates settling that company's rate case.<sup>3</sup>

#### (ii) The Power Commission's Attitude.

The Power Commission, as contrasted with its counsel now taking an apparently contrary position, has recognized that within the constitutional regulatory scheme these pipe lines are entitled to the funds now impounded and owed to

<sup>3</sup> "During the interval from January 20, 1946, to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

"In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945."

(See Appendix A to brief of Mississippi in opposition to petitions for certiorari, pp. viii-ix.)

them. While there is not strict contemporaneity between the Natural Gas Act and the pronouncement set forth in footnote 4, still the Commission's construction of the powers given to it is entitled to weight by the courts. *Great Northern Railway Company v. United States*, 315 U. S. 262, 275; cf. *Swendig v. Washington Water Power Co.*, 265 U. S. 322; *Social Security Board v. Nierolko*, 327 U. S. 358, 367.

(iii) Any Other Result Would Require the Court to Engage in Rate Making.

It is well recognized that it is not part of the judicial process to engage in the legislative function of making rates. *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 143; *Central Kentucky Natural Gas Company v. Railroad Commission*, 290 U. S. 264; *Newton v. Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence. The Commission distin-

The cost of gas purchased by Mississippi from its affiliate Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by \$301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a 'commodity' charge; and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volumes of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision. (F. P. C. Opinion No. 126. In re: Mississippi River Fuel Corporation, et al., Docket No. G-462, 4 F. P. C. 340 at 359; R. 74.)

guishes the situation presented here by noting that the evaluation of the fairness of past rates is a judicial rather than a legislative function. The fact of the matter is that legislative characteristics can arise in determining the fairness of even past rates if the concern will be one primarily of making policy on the myriad of facts. Rate making certainly will be necessary and whether for the future or the past, premises of policy will necessarily have to be decided upon. All three of the purchasing pipe line companies make sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by

<sup>3</sup> The *Attorney General's Manual on the Administrative Procedure Act* (1947) states this very succinctly and well at page 14:

... More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation, or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1944), pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep., p. 39 (Sen. Doc., p. 225); 92 Cong. Rec. 5648 (Sen. Doc., p. 353).

the Commission, the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U. S. 507. If all of the claimed funds were handed out to just domestic consumers or even all so called "ultimate consumers", the court, contrary to the assertions of the Commission, would be indulging in local law and would impinge upon local regulation—a fact really recognized in the Commission brief on its petition for certiorari (p. 10n). That rate making is involved is indisputable since some of the funds result from sales that are only regulable by states. Therefore, the court below would have had to make an allocation of the fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for *all* gas regardless of who ultimately would use it or purchase it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto, would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by each purchasing pipe line company. It would entail an entry into a myriad of questions of fact and none of law. Cf. *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination, *inter alia*, of a return to which each pipe line was entitled from its direct state-regulable sales and thus a determination of the proper state rate for each state. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in

which payments were made into the registry of the court since the fairness or unfairness of rates is an ever changing thing. Considering the factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor. On none of these was the court below advised. Conceivably, if the court below had awarded the fund to all consumers, a pipe line company might find itself mulcted further and for the same sales by a subsequent award of reparations by a competent state agency.

Bearing in mind that a federal court may not engage in rate making because it is not a judicial power and, in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Company v. Railroad Commission*, 290 U. S. 264, 271), it would be hopelessly impracticable and unfair, as well as a usurpation of legislative and state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co. v. Florida*, 295 U. S. 301, where Mr. Justice Cardozo, in respect of restitution awards after a rate determination, stated at pages 317-318:

"The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large."



Here, Justice Cardozo was concerned with the practical aspects of the situation presented and he recognized that if restitution was to be made, a new scale of rates, retro-active in effect, would have to be used for that purpose. This the court refused to do. That case, however, was comparatively simple when compared to those presented here. In the *Atlantic Coast Line* case, the federal authority was in position of complete constitutional and statutory dominance over the situation and any zone of reasonableness related only to the criteria of rate making under one authority. In the cases at bar, however, in addition to the same zone of reasonableness in the criteria of rate making under the Natural Gas Act, there would be the same zone where only the states are competent to act; and, also, there would be a zone of naked assumptions as to the desire or authority of the states to act as well as the applicable rate making criteria of the states.

#### (iv) Conclusion As to the Exercise of Discretion.

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that the three pipe line companies paid the money to Interstate; that only these companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that some of the sales by the pipe line companies were subject only to state regulation if at all; that the rate situation of at least one purchaser (Mississippi River Fuel Corporation) was never stabilized until well after the impoundment period and that the other companies underwent rate changes during that period; and that it could pass on any interest in the fund beyond these companies only by indulging in the non-judicial and extra



jurisdictional activity of federal and state rate making, it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

#### IV.

#### **The writs of certiorari should be vacated for lack of proper parties.**

Interstate contends that none of the petitioners in these several cases, have the standing to seek review either because of no interest or because their interest is inconsistent with the stand taken.

##### **A. Principles of Law.**

Of long standing is the general rule that the jurisdiction of the Supreme Court can be invoked only by one having a personal interest in the litigation, and not merely an official one. *Smith v. State of Indiana ex rel. Lewis*, 191 U. S. 138, 148-149. And this interest must be such that not only will a benefit to policy result but one must stand to have property diminished, burdens increased or rights detrimentally affected by the order up for review. *McCandless v. Pratt*, 211 U. S. 437, 443, 445; *Farmers Loan & Trust Company v. Waterman*, 106 U. S. 265; *In re Michigan-Ohio Boulevard Corporation*, 117 F. 2d 191, (C. C. A. 7); see *Barriger v. Louisville Gas & Electric Company*, 196 Ky. 268, 244 S. W. 690, 31 A. L. R. 1408, 1411. "The interest must be substantial, and a merely nominal party to an action cannot appeal." *Hamilton Trust Company v. Cornucopia Mines Company, et al.*, 223 Fed. 494 (C. C. A. 9, 1915, cert. den'd 239 U. S. 641) *Ohio Contract Carrier Association v. Public Utility Commission*, 140 Ohio St. 160,

42 N. E. 2d 758, 759 (Ohio Sup. Ct., 1942). Aside from the position of the parties in respect of interest and aggrievement, it also is necessary that a justiciable cause be presented to the court—not one asking for “a gratuitous advisory judgment” upon a matter which has become moot by supervening events. *Public Utilities Commission of Ohio et al. v. United Fuel Gas Company et al.*, 317 U. S. 456, 466. That the United States is seeking review, does not lessen the jurisdictional strictures (*United States v. Union Pacific Railroad Company*, 105 U. S. 263) unless there is some special statutory provision. See *United States v. Maria De La Paz Valdez De Conway et al.*, 175 U. S. 60, 69-70. Certainly an agency of a government department would have no greater rights.

In the light of the foregoing principles, Interstate respectfully submits that the petitioners in these cases do not meet the required jurisdictional tests.

#### **B. The Federal Power Commission.**

The Power Commission has carried through successfully all that it set out to do and could do under its organic law,—i.e., the Natural Gas Act. That Act sets forth what the functions of that Commission are and what it may do. Its legitimate work in reference to the rates in controversy ceases on the final affirmance by this Court of the rate determination.

The Power Commission stood no loss, nor did it stand to be detrimentally affected by the disposition of the fund. Its position was only an official one and that of a nominal party only since the matter of distribution of impounded funds was docketed as the appeal to the Circuit Court had been docketed. The most that could be said for the Power Commission is that it is interested in the policy involved.

From the requirements of the situation of parties seeking review set forth above, it is clear that the Power Commission has no standing in this Court. It seems clear, also, that the Power Commission, if it is to be heard at all, should stand in the position of *amicus curiae* because of its obvious general interest in the question involved. This is provided for adequately in your Honorable Court's Rule 28 which gives to the Commission the opportunity as of right to appear in such role.

The Power Commission does not represent the consumers as do local and state commissions. (See *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company, et al.*, 249 U. S. 134, 146). The consumers are the ultimate distributees of gas and, as such, are bound inextricably with the distribution function. While protection of consumers at retail may have been the purpose of the Natural Gas Act, the means adopted were limited in scope and comprehended only the Commission's participation in the wholesale function.<sup>6</sup> The Act has no application "to the local distribution \* \* \*." Section 1(b), 15 U. S. C. 717(b). Indeed, no consumer even has standing before the Power Commission to complain of a rate over which it has jurisdiction. The jurisdiction to proceed on a rate case is

<sup>6</sup> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act but from the exceptionally explicit legislative record, and from this court's decisions" (*Central States Electric Co. v. City of Muscatine*, 324 U. S. 138 at 144.)

given to the Power Commission only "upon its own motion or upon complaint of any State, municipality, State Commission, or gas distributing company."

### C. The Missouri Commission and the Illinois Commission.

Interstate does not assert that state commissions do not represent the consumers within their respective bounds. Beyond that, however, all of the principles set forth above in respect of a party's right to seek review are applicable.

It has been pointed out that these state commissions represent consumers who get their gas only through Mississippi River Fuel Corporation in so far as this case is concerned. Consequently, it is the rate situation of Mississippi which is involved. Mississippi, as the Power Commission

<sup>7</sup> Natural Gas Act, *supra*, Sec. 5(a), 15 U. S. C. Sec. 717d(a), which provides in the part material here as follows:

"Sec. 5(a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: \* \* \*"

Section 13, 15 U. S. C. Sec. 717l, provides:

"Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission."

and the Missouri and Illinois Commissions admit (Commission brief, p. 56; Stipulation, Appendix A to opposition brief of Mississippi; Illinois Commission brief on certiorari, p. 18n), has given effect to the Interstate rate reduction back to January 20, 1946, the date when the Power Commission's rate order against Mississippi was to be effective and the old rates found to be excessive were no longer of any effect. Thus, all distributing utilities in Missouri and Illinois who were supplied by Mississippi have received all benefits to which they are entitled under the rate reduction order against Mississippi. The funds impounded prior to that time in the court below represented money paid to Mississippi under the only legally effective rate then in force and free of any claim for reparations. (See *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618; *Mississippi Power & Light Co. v. Memphis Natural Gas Company*, 162 F. 2d 388 (C. C. A. 5))<sup>8</sup>.

It is apparent, therefore, that Mississippi's customers have gained all that they could have received—in the same manner and to the same extent if a stay had not been granted in the Interstate rate case and if Mississippi had, on January 20, 1946, put into effect and passed on the benefits of the wholesale price it paid to Interstate. It is earnestly contended, therefore, that the consumers have the right to receive their due from the utility distributors no matter

<sup>8</sup> In this connection it should be noted that the Power Commission's own rules provide:

"No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948), Part 154.2, Fed. Reg. 8598.)



what is the outcome of these causes. They could not have obtained any more had the Commission rate reduction orders never been contested. Thus benefited, questions as to their rights are no longer justiciable and the grant of certiorari should therefore be vacated.

#### **D. Memphis Light, Gas and Water Division.**

This petitioner apparently is a proprietary department of the City of Memphis, Tennessee (R. 25). In that capacity it claims that it is the "ultimate consumer" entitled to share in the refund (R. 26). Obviously this petitioner is not an "ultimate consumer" but is an intermediary the same as a distribution company would be. There is no showing that the rates to Memphis citizens would be reduced by payment to this city department nor, assuming equities in "ultimate consumers," that it could, on behalf of said citizens, give a proper release and acquittance if the fund would be awarded to ultimate consumers. It is not acting as representative of a class of claimants (Cf. *Ex parte Lincoln Gas and Electric Company*, 256 U. S. 512) but is acting purely and expressly for itself. There is no evidence of its rights or equities in this case and without such rights or interest in itself or in those it represents, it does not have the requisite interest on this review.

The Memphis Light, Gas and Water Division has adopted the brief and argument filed on behalf of the Commission. To do so immediately points up a false assumption: it argues, per the Commission brief, for distribution to ultimate consumers but claims the fund only for itself.

#### **Conclusion.**

Interstate maintains that the order of the court below must be affirmed because the court acted in the sound exer-



cise of discretion in the management of the fund and reached the only result consistent with its limited powers. The Court below could not have disposed of the matter otherwise without indulging in retroactive rate making not only of federally but also state regulable matters. The result reached would have been the only proper one without any teachings from the *Central States* case and the court did not act under a feeling of compulsion from that case.

In addition, no petitioner in these cases now represents claims of the ultimate consumers whose alleged rights and equities arising from the grant of the stay order they urge. The Missouri and Illinois Commissions, while competent to act, are the advocates only of moot questions since customers in their respective states will gain all benefits they would have derived had a stay never been entered in the Interstate case. The Power Commission is a body of limited representative right and under the Natural Gas Act does not now represent ultimate consumers. The Memphis Light, Gas & Water Division while it argues for the ultimate consumers, claims a share in the fund in its own corporate right.

It is respectfully submitted, therefore, that the order of the court below should be affirmed; or, in the alternative, the grant of writs of certiorari should be vacated for lack of proper parties or justiciable issues.

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FILED

JAN 4 1949

CHARLES ELMORE CROPLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION, et al.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 168

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 300

MISSOURI LIGHT, GAS AND WATER DIVISION

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 312

ILLINOIS COMMERCE COMMISSION

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF FOR MISSISSIPPI RIVER FUEL  
CORPORATION, A RESPONDENT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

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No. 109.

FEDERAL POWER COMMISSION, *et al.*

*v.*

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No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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No. 209.

MEMPHIS LIGHT, GAS AND WATER DIVISION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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No. 212.

ILLINOIS COMMERCE COMMISSION

*v.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR MISSISSIPPI RIVER FUEL CORPORATION, A RESPONDENT.

### Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.



## Jurisdiction.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-112). Petitions for writs of certiorari in Nos. 109, 188, 209, and 212 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

## Statement.

The historical statement of the events leading up to the judgment here under review, as contained in the brief for the Federal Power Commission (Commission) on pages 3 to 8 is correct in the main. In addition it is important to note that the schedules embodying the reduced rates ordered by the Commission, while not filed by Interstate Natural Gas Company, Incorporated (Interstate) until December 10, 1947, actually were made effective for all bills rendered to Mississippi on and after July 15, 1943. The filed schedules thus complied with the Commission's order requiring the filing of the reduced rates by June 15, 1943.<sup>1</sup> Such rates thereby became the only lawful rates applicable

<sup>1</sup> Paragraph "(c)" of the Commission's order of March 17, 1948 (not yet reported) accepting Interstate's rates filed December 10, 1947, states:

"Interstate filed on December 10, 1947, supplements to its schedules of rates and charges to effect the remaining amount of the reduction ordered by the Commission's order of April 27, 1943, as modified. Such new supplements are designated as Interstate's Supplement No. 8 to Rate Schedule FPC No. 4, covering the sale of gas to Mississippi River Fuel Corporation; Supplement No. F to Rate Schedule FPC No. 26, covering the sale of gas to Southern Natural Gas Company; and Supplement No. 3 to Rate Schedule FPC No. 25, covering the sale of gas to Memphis Natural Gas Company. Such supplements are proposed to be made effective as to all bills rendered on and after June 15, 1943, for sales to said purchasers."


to the sale of natural gas by Interstate to Mississippi subsequent to June 13, 1943 and were the basis for computing the amount of excess charges collected from Mississippi by Interstate during the effectiveness of the stay order entered June 14, 1943 (R. 72). Collection of the reduced rate commenced in October 1947 (R. 72), but it is not correct that they were only put into effect as stated in the Commission's brief, page 4.<sup>2</sup> The total amount of excess charges paid by Mississippi during the effectiveness of the stay order is \$1,484,582.53 (R. 110). The statement of allocation of impounded funds furnished by the Commission (R. 30) shows that 63% of the excess charges relate to gas sold by Mississippi to direct industrial consumers. Of the 37% allocable to gas sold to utility distributing companies for resale, those companies have already directly received from Mississippi the allocated excess charges paid subsequent to January 20, 1946 (Commission brief, pp. 55-57, note 25). This leaves for consideration by this Honorable Court in the case of Mississippi the disposition of the excess charges paid prior to January 20, 1946 allocable to gas sold to the utility distributing companies.<sup>3</sup> Not only does Mississippi have a clear and recognizable legal right to be repaid the entire excess collected by Interstate but Mississippi stands in a unique and strong equitable position as to all of such excess charges.

<sup>2</sup> The significance of the actual effective date being June 15, 1943 rather than October 1947 is found in the right of Mississippi under the Natural Gas Act to recover from Interstate charges for natural gas in excess of those specified in the lawfully effective schedules now on file with the Commission. The Natural Gas Act and the Commission's rules prohibit the collection of any other than the lawfully filed rate.

<sup>3</sup> We do not find any contention in the Commission brief that the excess charges allocable to direct industrial sales should be distributed to those customers. (Commission brief, p. 51, note 22. See discussion *infra*, p. 21.)

The Commission rate proceedings against Mississippi instituted in 1943 resulted in a rate order on November 9, 1945, made effective January 20, 1946 (4 F. P. C. 340) which was remanded to the Commission by the Court of Appeals of the District of Columbia (*Mississippi River Fuel Corporation v. Federal Power Commission et al.*, 163 F. 2d 433) and finally was settled by stipulation on May 8, 1948 (Commission brief, p. 56). By this stipulation Mississippi among other things, in the words of the Commission brief herein (*supra*) was "to pass on that portion of the reduction in cost stemming from the Interstate rate order which accrued since January 20, 1946, the date on which the Commission had originally ordered Mississippi to place reduced rates in effect." This has been done pursuant to that stipulation and the Commission issued an order on the basis thereof. (This order is set forth as a part of the stipulations appearing as Appendices A and B of Mississippi's brief in opposition to granting certiorari, pp. i *et seq.*, particularly viii and xx).

The claim which Mississippi asserts to the fund, therefore, must be considered in the light of the following facts: It already has passed on to its distributing company customers any benefits from the Interstate rate order by reduced rates for that part of the impoundment period commencing with January 21, 1946, the earliest day the rate order could possibly have taken effect against Mississippi. The utilities in Missouri and Illinois have agreed to pass on the benefits of any reduction in the rates of Mississippi (R. 94, Commission brief, p. 49, note 21). It is apparent that the only question as to Mississippi is whether it loses that portion of the impounded funds represented by excessive charges paid by it before January 21, 1946, the effective date of the Commission rate order (See Commission brief, p. 56, note 25).



As indicated in the Commission brief, (pp. 55 *et seq.*) the Commission based its rate order against this respondent on 1943 sales. In so doing, however, it expressly did not use actual 1943 costs as a basis for determining excesses over fair return.<sup>1</sup> No findings whatsoever were made as to the years 1944 and 1945.

### The Questions Presented.

Before stating the questions to be considered by this Honorable Court in reviewing the judgment as it relates to Mississippi we are compelled to take issue with the Commission's brief as to the matters presented for this Court's determination. Twice, at the outset the Commission's brief states that the Circuit Court considered and held itself "compelled" by *Central States Co. v. City of Muscatine*, 324 U. S. 138 to distribute the collected excess charges to those who paid them (Commission brief pp. 2 and 8). No such statement is found in the Circuit Court's opinion (R. 103-105). It is a self-serving conclusion inserted as a stepping stone to the principal object of all the petitioners—namely, the overruling of the *Central States* case.

The points here for decision are *not* the overruling of the *Central States* case or whether that case compels distribution of the excess charges to those who paid them to Interstate. The citation of that case in a footnote without any quotation therefrom or comment thereon is not indicative of the total basis for the judgment below.

<sup>1</sup> The Commission adjusted actual expenses downward and used speculative future expectations in business as the reason for not using expenses as actually incurred. The full text of the Commission's order and opinion indicates that 1943 was used as a test year for sales volumes and gross revenues alone and the Commission did not make any conclusions as to the *actual* 1943 rate situation. See 4 F. P. C. 340, 346-351, 360.

The opinion of the court below (R. 103-105, 166 F. 2d. 796) discloses that the court after "A careful consideration of the opposing contentions, in the light of the undisputed facts" felt that it only could award to the pipe line companies the amounts which *they* paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them". The issues and the facts moved the court below, not any feeling of compulsion from *Central States*.

Particularly as relates to Mississippi the questions to be passed upon are these:

1. Does the Natural Gas Act prevent one natural-gas company from recovering charges of another natural-gas company found to be unlawful and excessive by the Commission and ultimately sustained judicially, because such excess charges were ordered impounded as a condition to a stay?

2. What is the authority of a Court of Appeals in respect of a request for a stay of an order which is being reviewed under Section 19 of the Natural Gas Act?

3. Did the Court of Appeals abuse its discretion, inherent in the exercise of its equitable jurisdiction, in entering the order of distribution to the natural-gas companies who paid the unlawful charges?

4. If a natural-gas company was compelled to pay excess charges during and because of a stay but later effectuated a plan with the Commission to give up that portion of excess charges paid from the earliest possible time a rate order could have been effective against it, can it now be required to give up the remainder which would be more than would have been legally requirable had no such stay ever been entered?



## SUMMARY OF ARGUMENT.

### I.

The Judgment of Distribution to Mississippi is proper under the Natural Gas Act.

1. While the principles inherent in the *Central States* case are not in conflict with the judgment under review, nevertheless Mississippi does not rely on that case as a justification for its claim to recover the charges unlawfully collected from it.<sup>5</sup>

Were it not for the Natural Gas Act this case would not be here for review. Consequently the directions of that Act should be followed in deciding this case.

The Natural Gas Act provides for full rate regulation of a natural-gas company by the Commission which it exercises by the medium both of interim and final orders. *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U. S. 575. The Commission exercised this authority against Mississippi to the fullest extent permitted by the Act and thus provided for passing on of the Interstate reduction from the date of the Commission's order reducing rates of Mississippi. The result is the same as if the Interstate rate order had not been stayed and the Natural Gas Act does not provide for more than that.

2. By Section 19 of the Act the Court of Appeals has exclusive jurisdiction to affirm, modify or set aside a Commission order, subject to review by the Supreme Court of the United States upon certiorari or certification. The Act provides that the commencement of review proceedings

<sup>5</sup> Since the Commission's brief directs its argument to the excess charges allocated to sales to distributing companies for resale, we do likewise at this point. We discuss Mississippi's right to the excess charges allocated to its direct industrial sales *infra*, p. 21.



"shall not, unless specifically ordered by the court, operate as a stay of the Commission's order" Section 19(c). The Act makes no provision for terms and conditions so that the granting of a stay is wholly within the court's discretion. It is acting as a court of equity and accordingly has broad discretionary powers.

3. At the time of the entry of the distribution order the Commission had pending a rate case involving rates of Mississippi and so the court properly ordered the payment to Mississippi of the entire impounded funds since whatever could be done by the Commission under the Natural Gas Act remained to be done. Thus, the purpose and plan of the Natural Gas Act was carried out both by the court's judgment and the subsequent settlement of the Mississippi rate case. There was no abuse of the discretion lodged in the court by the Act:

## II.

### **The Contentions of the Commission Are Not Inconsistent With a Distribution to Mississippi.**

1. Assuming all of the alleged infirmities and distinguishing features of the *Central States* case which the Commission urges as grounds for overruling or distinguishing that case, the contentions of Mississippi are substantially consistent with all that the Commission argues. Since the Commission has no reparation powers and Mississippi has given effect to the final rate reduction order against Interstate back to the time any rate determination could possibly have been effective against Mississippi, its (Mississippi's) "ultimate consumers" have suffered nothing from the grant of the stay in the Interstate review proceedings.

2. Since the Commission argument assumes that there occurred "a loss as a result of the court's action in granting

the stay", the consistency between the Commission's argument and the contentions of Mississippi is apparent because no mediate consumers of Mississippi will suffer loss from the granting of the stay. Also Mississippi from January 21, 1946 until the time funds were no longer impounded under the Interstate stay, has earned a return fixed by the Commission itself and thus the rate situation of Mississippi's mediate customers was not changed one iota by the fact that a stay was granted in the *Interstate* case.

3. Since Mississippi's mediate customers have not suffered by the fact that there was judicial review, the doctrine of the *Central States* case in Mississippi's situation has no applicability and since Mississippi itself never sought a stay of the Commission rate order against it, there can be no implications of frivolity in seeking a stay pending appeal so far as Mississippi is concerned. As to whether a stay order as an abstract matter encourages frivolous litigation, complete answer is found in the fact that the stay does not issue as a matter of right and its granting and continuance is subject to the grace of the court and the searching inquiry of the Commission.

4. Whether the *Central States* case is overruled or distinguished should make no difference in the award of the proper share of the fund to Mississippi since the "ultimate consumers" of Mississippi will be made whole to the same extent as though a stay order had never been entered in the *Interstate* case. Since the alleged frailties of the *Central States* case lie in the fact that a stay order operates to deprive a certain company's "ultimate consumers" of their share of a reduced rate, the argument is inapplicable against Mississippi since Mississippi's "ultimate consumers" are not adversely affected by such stay order.

## ARGUMENT.

### I.

**The judgment of distribution to Mississippi is proper under the Natural Gas Act.**

- (i) **The Natural Gas Act does not require Mississippi to distribute to ultimate consumers excessive charges collected from it.**

The Commission, by Section 5 of the Natural Gas Act, after a hearing, has authority to determine if the rates charged by a natural-gas company are unlawful, and then must fix the lawful rate. Until changed by the filing of new schedules by a natural-gas company or by a Commission order the rates contained in the duly filed schedules are the only rates which can be collected or paid.

"No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948) Part 154.2, 12 Fed. Register 8598.)

The right to recover excess charges is based upon this rule and Sections 4 and 5 of the Act.

The powers of the Commission in rate matters are plenary and while there is no right to order reparations (*Federal Power Commission v. Hope Natural Gas Co.*, 320

U. S. 591, 618) there is authority to give present effect to an imminent reduction in operating expenses. The Commission, after hearing, has utilized the technique of an interim order so that a prompt reduction may be had. Such was done in reducing rates of Natural Gas Pipeline Company of America, and the interim power was sustained (*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575). The Commission used this interim authority in rate cases against Cities Service Gas Company, 3 F. P. C. 459, and Panhandle Eastern Pipe Line Company, 3 F. P. C. 273.

The settlement method of reducing rates also has been used as is well illustrated by examples in the Commission brief, page 36, as to United Gas Pipe Line Company, pages 53-55 as to Southern Natural Gas Company, and pages 57-58 as to Memphis Natural Gas Company. In each of these instances the Commission had plenary authority to make an interim order and as a condition to the acceptance of any settlement could have required an adjustment in respect of the Interstate reduction; as it did in the case of United Gas Pipe Line Co.

That the Natural Gas Act contemplates complete rate jurisdiction in the Commission, and not in the Court of Appeals as a condition to a stay is well illustrated by the actual sequence of events in the case of Mississippi.

The Commission instituted a rate investigation against Mississippi on April 6, 1943, prior to the order reducing Interstate's rates, 3 F. P. C. 972. Until a hearing was had no valid order against Mississippi could have been entered and it was on November 9, 1945 that a reduction in Mississippi's rates was ordered. Since the Interstate rate order had been stayed no effect to it was then given. Mississippi filed a review petition and the order reducing rates was

affirmed in part and reversed in part. This put the matter back before the Commission and then the final order closing the case gave full and complete effect to the Interstate reduction. (Commission brief page 56; Commission order of July 20, 1948, Appendix A to brief of Mississippi in opposition to *Certiorari* vii to x).

The fact that the Commission did not exercise all its authority against Southern Natural or Memphis Natural is not a justification to the exercise of those rate fixing functions by the Courts. Particularly, is this clear in the case of Mississippi. Beginning in June 1943, it was compelled by the operation of the stay order to continue paying to Interstate the same amounts for gas that it had paid previous to the Power Commission rate order against Interstate. It was not until January 20, 1946 that any determination had been made effective in respect of the reasonableness of Mississippi's resale rates. On such date Mississippi effected the lower rates, subject to court review. Since that time such review has been had and by rates now on file with the Commission, the reduction in price of Interstate gas to Mississippi has been passed on in accordance with the Power Commission's order accepting such rates for filing back to January 20, 1946. Had no stay been granted in the *Interstate* case, Mississippi would have been entitled to keep all of the money represented by the difference between the old Interstate rate and the Power Commission prescribed Interstate rate. It would have been perfectly legal and proper for it to have done so. How then can it be said that it would not now be legal, proper and equitable for Mississippi to have turned over to it its aliquot portion of the fund? The answer is that in justice and equity Mississippi is entitled to its share in the fund. (See *Atlantic Coast Line Railroad Company v. Florida*, 295 U. S. 301, 309-311).



Since the Natural Gas Act does not require any reduction in Mississippi's rates prior to January 21, 1946, no distribution to any other than Mississippi of its share can validly be made. Its rates thus would be reduced without a valid order and the court would be doing that which is prohibited to the Commission. The Natural Gas Act does not provide for more than would result had there been no stay.

**(ii) The Court of Appeals has broad discretion in the granting of a stay and the conditions thereof.**

The only authority which the Natural Gas Act confers upon the Court of Appeals is found in Section 19 (b) and (c) which confers exclusive jurisdiction to affirm, modify or set aside a Commission Order, subject to review by the Supreme Court of the United States upon certiorari or certification.

By Section 19(c) of the Natural Gas Act (15 U. S. C. Sec. 717(c)) it is provided that:

"The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

This in effect means that it is within the court's discretion whether a stay will or will not be granted (*Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment. (*Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264, 271). The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. (*Inland Steel Company v. United States, et al.*, 306 U. S. 153; *Ford Motor Co.*



v. *N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company v. City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coast Line Railroad Co. v. Florida, et al.*, 295 U. S. 301, 309. In that case it was stated: “Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it \* \* \*

(*id.* at 310). The case which best illustrates the breadth of discretion involved is *Inland Steel Company v. United States, et al.*, (306 U. S. 153). In that case this Court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that not only is the discretion as to the granting of a stay order with or without conditions very broad but also in such a way that, along with the authority of *Ford Motor Company v. N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company v. City of Muscatine* (*supra*), that “\* \* \* the federal court which has this fund has considerable discretion in its management. *United States v. Morgan, supra*. I fail to see how it abused its discretion in handing the fund over to the officials.”

**(iii) There was no abuse of discretion.**

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the

court exercised its discretion both in respect of applicable facts and applicable law.

(a) The Fund and Its Origin.

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order, and new rate schedules were filed effective July 15, 1943 (see footnote 1, *supra*). On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which \$1,484,582.53 is applicable to excess charges to Mississippi River Fuel Corporation" (R. 110) represent the difference between the attacked and the prescribed rates.

There is no dispute that Mississippi was an immediate obligor of Interstate and directly paid to Interstate the funds now in dispute (R. 57). It is apparent, also, that the rate situation of Mississippi in respect of its resale sales was never determined finally during the period of impoundment, and as indicated elsewhere herein (*infra* p. 29) no finally effective rate order was entered against it on its sales for resale until July 20, 1948.

(b) Any Other Result Would Require the Court to Engage in Rate Making.

It is well recognized that it is not part of the judicial process to engage in the function of making rates. *Central States Electric Company v. City of Muscatine*, 324 U. S. 138,

143; *Central Kentucky Natural Gas Company v. Railway Commission*, 290 U. S. 264; *Newton v. Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence. The Commission seeks to get around this point by noting that rate making is a legislative process prospective in scope and that questions of past fairness are judicially determinable questions. This as a matter of strict division of functions may or may not be correct. See *Arizona Grocery Company v. Atchison, T. and S. Ry.*, 284 U. S. 370. The best discussion of the reason for the bifurcation is contained in the *Attorney General's Manual On the Administrative Procedure Act* (1947). (Sec 5 U. S. C. Sec. 1001 *et seq.*):

"More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudi-

cation is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep. p. 39 (Sen. Doc. p. 225); 92 Cong. Rec. 5648 (Sen. Doc. p. 353)."

It is apparent from this considered discussion that formulation of policy is as important a consideration as is the element of time in determining whether a matter is legislative or not. In the case at bar, the court below would definitely have to engage in policy making and rate making in order to reach any result other than the one here on review. Whether the function would be legislative also would only add another infirmity to the court's assumption.

Mississippi makes sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by the Power Commission, the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U. S. 507. With this situation, what could the court below do? If all of the claimed funds were handed out to so-called ultimate consumers, the court, contrary to the assertions of petitioners, would be indulging in local law and would impinge upon local regulation. This is indisputable since some of the funds result from sales that are only regulable by states—in the case of Mississippi, this is the greater amount of sales (*supra* p. 3). Therefore, the court below would have had to make an allocation of the

fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for *all* gas regardless of who ultimately would use it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto, would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by Mississippi. It would entail an entry into a myriad of questions of fact and none of law. Cf. *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination, *inter alia*, of a return to which Mississippi was entitled from its direct state-regulable sales and thus a determination of the proper state rate for each state. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in which payments were made into the registry of the court. Considering these factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations and, consequently, many determinations of local policy. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor<sup>6</sup>. Conceivably, if the court below had awarded the fund to all consumers, Mississippi might find itself mulcted further and for the same sales by a subsequent award of reparations based on different concepts by a competent state agency.

<sup>6</sup> By order dated December 22, 1948, the Missouri Public Service Commission held that Mississippi's direct industrial sales are not subject to regulation by that body under the statutes of the State of Missouri.

Bearing in mind that a federal court should not engage in rate making and, in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U.S. 264, 271), it would be hopelessly impracticable and unfair, as well as an usurpation of state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co. v. Florida*, 295 U.S. 315, where Mr. Justice Cardozo, in respect of restitution awards after a rate determination in a much simpler situation, stated at p. 318:

"The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large."

### (c) Conclusion as to the Exercise of Discretion.

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that Mississippi paid the money to Interstate; that only it and the other similarly situated companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that the greater part of the sales by Mississippi were subject only to state regulation if at all; that it could pass on any interest in the fund beyond Mississippi only by indulging in the activity of federal and state rate and policy making; and that



Mississippi's rates were still under consideration by the Commission; it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

#### (d) Direct Sales to Industries.

Reference has been made to the power of the states to regulate these sales if appropriate state legislation was enacted. These sales are made under contracts privately negotiated for specific periods of time. They are not made as public utility sales (R. 74-75). The Public Service Commission of Missouri has recently held that the statutes of that state do not provide for regulation of these sales as made by Mississippi. A proceeding in Illinois to test the regulatory authority of the Illinois Commerce Commission over Mississippi's sales to industries in that state is still pending (R. 75). The amount of excess charges allocated to those industrial sales is the greater part of the unlawful exactions. These sales are purely private transactions carried on as a private business in competition with other fuels. The competitive value to the industry determines the price. The cost of gas to Mississippi is not what sets the value to the industrial purchaser. To distribute to these industrial customers the excess charges paid by Mississippi would constitute the plainest example of taking from A and giving to B.

While little is said in the Commission brief about these sales, we do not find any contention that Mississippi is not entitled to that part of the impounded funds. The court could have done none other than distribute that part to Mississippi.

## II.

**The contentions of the Commission are not inconsistent with a distribution to Mississippi.**

Reduced to essentials, petitioners all contend that the order of the Court below should be reversed because the stay order deprived ultimate consumers "of the benefits of the reduced costs of gas purchased through three intermediary pipeline companies." All contentions in respect of *Central States Electric Company v. City of Muscatine* (324 U. S. 138) and subsidiary points in urging overruling or distinguishing of that case are calculated to remove the doctrine of that case from this situation. Mississippi, being in the position that it is, can demonstrate herein that all the Commission's brief in the main states, except for the erroneous conclusion as to the effect of the rate determination based on 1943 sales volumes (see Statement) is consistent with the return to it of the excessive charges paid by Mississippi.

Mississippi respectfully requests constant attention to the fact that it has, with Commission approval and agreement, given effect to the Interstate rate order back to the time the Commission ordered Mississippi to reduce its rates, in January 1946. This had the same effect as though no stay order ever had been entered in the Interstate rate case since only a prospective rate order can be made by the Commission. See *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 581, 618. It is evident therefore that if Mississippi must give up its share of the excessive rates paid before the Commission rate order against it was effective, it loses more than it would have lost had a stay never been granted. Assuming, *arguendo*, the

accuracy of what the Commission contends, Mississippi still is entitled to its share of the total fund.

The first main heading (I, p. 17) of the Commission's argument is "THE *Central States* CASE SHOULD BE REEXAMINED AND OVERRULED."

A. The Commission contends: "A federal court has jurisdiction to distribute impounded funds to ultimate consumers, as against the claim of purchasers for resale."

The *Central States* case like the one at bar arose entirely out of the fact that a stay had been granted. The Commission argues then that the court below acting as a court of equity granted injunctive relief which must be predicated upon terms protecting those whom the injunction might affect (citing *Inland Steel Co. v. United States*, 306 U. S. 153, 157). Pervading such function the court, so argues the Commission, can arrogate unto itself extraordinary and even extra judicial powers because the stay was ancillary to the main purpose of review and can protect all concerned even though not parties to the record. Equity is charged, therefore, with "ascertaining who suffered a loss as a result of the court's action in granting the stay" (Commission brief, p. 22).

Up to this point, there is nothing inconsistent with Mississippi's claim. A departure occurs (pp. 22-23), however, when the Commission contends all three pipe line companies including Mississippi suffer no loss from the stay. There is loss of the difference between the greater costs as paid and the Commission rate. This was money Mississippi could keep at least until a rate order became effective against it had no stay been granted. Mississippi at the date of the stay order, already was before the Com-

mission in a rate investigation (Commission brief, pp. 55-56). Here there would be monetary loss to Mississippi since it would have to pay out what it otherwise could have kept had there been no stay order at all. The Commission must agree with this construction since it concludes this portion of its argument as follows: "It is only those consequences which resulted from the stay which the court should correct in distributing the impounded fund." (p. 23) This quotation is the gravamen of the Commission's argument and is wholly consistent with the action of the court below in ordering distribution to Mississippi.

Next the argument is taken up with an attempted demonstration that only the ultimate consumers suffer monetary loss by the stay; that in equity they are entitled to the fund; and, again, that the court below should attempt, and it is within its competence, to correct the wrong resulting from the stay. This assertion that only ultimate consumers suffer loss clearly is not so as to Mississippi since under the aegis of the Commission itself this respondent has given effect to its rate situation in a manner calculated, as the Commission admits (pp. 49, 50, 56), to give downstream customers, through state commissions having jurisdiction over the distributing companies, the same benefits that would have accrued had no stay been granted.

The last contention made under Part I, Subsection A of the Commission brief (pp. 31 *et seq.*) is that excessive return for the impoundment period would be given to the immediate purchasers from Interstate and that to prevent this, administrative determinations may be used. If already has been demonstrated that for the period of time in which the Commission was competent to act, this respondent has earned a return fixed by the Commission itself. As to what went before, the rate situation of Mississippi's customers

would not have been one iota different if a stay never had been granted to Interstate. With this established fact, Mississippi's mediate and immediate purchasers are securing all their just and legal due under the Natural Gas Act and that is all the Commission is claiming for them:

B. *The Commission Contends: "The Doctrine of the Central States Case Defeats the Objectives of the Natural Gas Act for the Period of Judicial Review."*

Under this subhead, the Commission argues that the doctrine of the *Central States* case nullifies the protection to ultimate consumers contemplated by the Natural Gas Act. Without admitting the validity of this argument, the fact remains that the doctrine of the *Central States* case has not affected Mississippi's "ultimate consumers" in any respect whatsoever. These consumers of Mississippi whether remediless as contended by the Commission (p. 40) or not, have been the recipients under a plan having Commission approval of all benefits which would have accrued had no stay order ever been entered in the Interstate case.

Next (p. 41) the Commission contends that the doctrine of the *Central States* case encourages frivolous litigation. In purported proof of this, the Commission points out that there was at the time the record was made in the Interstate case a stock and officer affiliation between Interstate and Mississippi. Entire refutation of the point sought to be made, however, is contained in the fact that Mississippi, before complete disaffiliation took place, appealed the Commission rate order against it without asking for a stay and began the process of filing rates as contemplated by the Commission order (R. 93, 96). As to Mississippi therefore no encouragement of frivolity is even remotely involved.

Also, in respect of this portion of the Commission's argument, even though it is evident that Mississippi is not affected by it, insight of the real motive behind this review can be gleaned from the apparent fact that the Commission is primarily concerned with establishing a principle contrary to the clear and express intention of Congress in providing for stay machinery in the Natural Gas Act (Section 19(c), 15 U. S. C. Sec. 717r(c)) and also is attempting now to attack the grant of the stay order; and also is arguing a matter outside the warrant of the writ of certiorari granted herein. In the first place, no frivolity was involved, nor was the stay order improvidently granted, for it must now be assumed that the importance of the jurisdictional question on the review proceedings, the justness of the request for a stay, and the balancing of conveniences and equities impelled the court below to grant a stay in the first instance. These are proper considerations when a stay is requested. *Magnum Import Company v. De Spoturno Coty*, 262 U. S. 159, 163-164. If the Commission at the time the stay was granted (or at any time thereafter if circumstances changed, see Stay Order, R. 2) was dissatisfied therewith (which was improbable since Commission counsel approved the form (R. 3)) it could have appealed the granting thereof to this Court. *Beaumont, Sour Lake & Western Railway v. United States*, 282 U. S. 74, 92; *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, 404. Since no appeal was taken nor cross appeal or petition filed at the time the rate determination was before this Court (331 U. S. 682), it hardly seems proper to give the Commission a second and third hearing on that matter—such is not the disposition nor function of the United States Supreme Court. See *Magnum Import Company v. De Spoturno Coty*, 262 U. S. 159, 163-164. A stay is a traditional judicial



method of minimizing the effects of far reaching judgments and orders and has been granted without express organic authorization. "The propriety of its issue is dependent upon the circumstances of the particular case." *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 9-14. Reliance surely can be placed upon the courts of appeal and upon the Commission's opposition to a stay if any review proceeding appears frivolous. The granting of a stay is wholly discretionary.

C. The Commission contends: "*This Court should overrule the Central States case.*"

Mississippi, it is submitted, would not be adversely affected by an overruling of the *Central States* case if the Commission thesis still prevails that the "ultimate consumers" should get all they would have been entitled to had no stay ever been granted.

It should be sufficient to point out that Mississippi's "ultimate consumers" will be or have been made whole to the same extent as though no stay order ever had been entered in the *Interstate* case.<sup>7</sup> In accepting such a condition of ending its rate case, Mississippi did rely upon the court's order of distribution and gave up the equivalent of the funds expected to be received. An order of complete

<sup>7</sup> The stipulation between Commission's General Counsel and Counsel for Mississippi ending the rate proceedings, which was accepted by the Commission, after setting forth the rates to be charged, provided:

"The rates and charges specified for the period from January 21, 1946 through and including the month of September 1947 reflect and give effect to the reduction in rates of Interstate Natural Gas Company, Incorporated, for that period. While usually treated as a commodity cost, the reduction in this instance is given effect by reflecting it in the demand charge as above set forth."

distribution to others would result in financial loss to Mississippi. To go beyond the agreement settling Mississippi's rate proceedings would be tantamount to requiring the court below to award reparations contrary to the intent of Congress (*Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 618) and contrary to the contentions of the Commission that "Court and agency are the means adopted to attain the prescribed end." (Brief, p. 34 quoting *United States v. Morgan*, 307 U. S. 183 at 191). Under the Natural Gas Act, the prescribed end is the prescription of rates for the future only (*Hope case, supra*).

The second main heading (II, p. 48) of the Commission's Argument is "THE PRESENT CASE IS DISTINGUISHABLE FROM THE CENTRAL STATES CASE."

Both in this main part of the Commission's argument and the foregoing main part, the Commission assumes that the court below felt compelled to find as it did because the *Central States* case compelled it to do so. We have heretofore pointed out the fallacy of this reasoning.

A. The Commission contends: "*The claims of the immediate purchasers here do not raise any questions determinable only by a state agency.*"

At this point, Mississippi is interested in merely pointing out that if only federal law is applicable to the situation, that federal law or doctrine must be consistent with the federal function under the Natural Gas Act and in conformity therewith, Mississippi is entitled to its share of the fund without any claim of or in the nature of reparation. (See *Federal Power Commission v. Hope Natural Gas Company, supra*). Having given effect to its rate situation from the date of the earliest possible effective Commission action

against it, Mississippi is not affected by this portion of the Commission's argument.

B. The Commission contends: *"The claims of the immediate purchasers do not involve rate making"*.

In the general discussion of this point in its argument, the Commission asserts that the ground urged by the pipeline claimants to the fund in the court below was one of privity. Examination of what was urged by Mississippi, however, will indicate that this respondent disclosed to the court its then rate case posture which was one of complete indefiniteness because of the partial reversal on appeal (R. 73-74). It also is disclosed therein that the Court of Appeals in remanding Mississippi's rate order to the Commission indicated the effect of the Interstate reduction should be considered and effectuated. This the Commission certainly did by the terms of the stipulation and final rate order in Mississippi's case above referred to. The fact is that when the petition for intervention and for distribution of funds was filed in the court below, Mississippi had no effective definitive rate order against it because of the partial reversal and remand on its appeal (163 F. 2d 433).

All that the Commission found with respect to Mississippi and referred to in its brief (pp. 55-57) was subsequently rendered infirm by the remand as well as by the Commission's own findings and order terminating the rate proceeding dated July 20, 1948. It should be noted too

The Commission's findings on this were:

"During the interval from January 20, 1936, to the present date Corporation has made extensive additions to its pipeline system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by

that the Commission felt that this disposition of the case was fair to Mississippi's "ultimate consumers".

Mississippi points out in its STATEMENT herein that the Commission determinations in its rate case based on 1943 volume of sales were not intended to give a true picture

Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system.

"In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission, commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945.

"Wherefore, for the purpose of settling and terminating the proceedings in this matter in so far as it pertains to Corporation, it is hereby stipulated and agreed by and between, Counsel for the Commission and Counsel for the Corporation as follows:

"Corporation will file with the Commission, and the Commission will accept for filing, supplements to the presently effective rate schedules of Corporation which shall provide for the following rates and charges:

(1) A supplementary rate schedule effective for all bills based on meter readings made after January 20, 1946, through and including the month of September 1947 having a net monthly rate for firm gas composed of a demand component of \$1.00 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries; and

(2) A supplementary rate schedule effective as to all bills rendered in October 1947 and continuing thereafter having a net monthly rate for firm gas composed of a demand component of \$1.12 per month per Mcf of Maximum Demand, and a commodity component of 13 cents per Mcf for all deliveries; and a net monthly rate for interruptible gas of 14 cents per Mcf for all deliveries."

<sup>a</sup> *Supra*, footnote X 8.

of Mississippi's 1943 rate situation because of eliminations and adjustments made by the Commission Staff and accepted by the Commission in its rate order (4 F. P. C. 340). Beginning on page 55 of its brief the Commission apparently is trying to indicate that the determination based on 1943 volumes should now be considered effective against Mississippi in order to deprive it of that amount of money which it would have been entitled to keep had no stay order ever been entered in the Interstate review proceedings. In addition to the frailty of this conclusion because of the adjustments and eliminations made, it must be noted that any 1943 determination, even if fairly made as to conditions then obtaining, would be a finding as to the lawfulness of past rates. It is conceded that the Commission's power to fix rates is limited to those "to be thereafter observed and in force" (Natural Gas Act, Sec. 5(a), 15 U. S. C. Sec. 717d). There is some question as to whether the Commission has power to make findings as to the lawfulness of past rates (see *Hope* case, *supra*, 320 U. S. at 618), but even if it has such power any errors obtaining in the 1943 findings which were not the basis for making a future rate determination could not be assigned as error and, consequently, were not reviewed by the Court of Appeals. Review in such case would have to abide the event of future administrative action. *Hope* case, *supra*, 320 U. S. at 619. If the Commission is contending, therefore, that the conclusions contained in its original rate order against Mississippi (4 F. P. C. 340) are effective in any sense and the court below should follow such rationale, the way then would be open for Mississippi to seek further review of said 1943 determinations, or else it would be deprived of such review if "administrative action" is the prerequisite. In the one case, the court below would be called upon

either to engage in nonjudicial administrative rate determinations or else, if the appeal be to the Commission findings and not the court's use thereof, its order could be collaterally attacked. On the other hand, if neither of the foregoing applies, the right of Mississippi to have such determinations reviewed would be lost.

The argument under this part of the Commission's brief is still directed toward showing that the *Central States* case should be distinguished and should not in itself have compelled the result reached by the court below. With this main purpose as well as the thesis of the Commission argument that ultimate consumers should not be affected by the grant of a stay in mind, the argument of the Commission still, overall, is consistent with the award to Mississippi.

C. The Commission contends: "*No other method of resisting the claim of the immediate purchasers is available.*"

This subsection of the Commission's argument contains obvious fallacies which it will not be necessary for Mississippi to point out for this respondent's position is consistent with the major assumption of the above quoted subsection "C" of the Commission's argument. Mississippi has itself, with the Commission itself, placed its rate status in such a position that its ultimate consumers, through action of appropriate state agencies, can secure all benefits which would have accrued to them had no stay order ever been entered in the *Interstate* case.

D. The Commission contends: "*The terms of the stay orders involved are different.*"

The stay order below provides (R. 2) for return to ultimate consumers or others "as contemplated by the pro-



visions of the Natural Gas Act." Mississippi has demonstrated the benefits accruing to ultimate consumers under the Commission order settling its rate controversy from the time even the remanded order was effective against it. It also has shown that since the Natural Gas Act provides only for prospective rate changes "after a hearing" (Section 5(a), 15 U. S. C. Sec. 717d(a)), giving effect to the Interstate reduction from the time of the effective date of the Commission order against Mississippi is "as contemplated by the provisions of the Natural Gas Act".

It is respectfully submitted that analysis of the whole of the Commission's argument will disclose no inconsistency of consequence with Mississippi's position.

Aside from the fact that there is no inconsistency with the argument as presented by the Commission and Mississippi's claims, it must be pointed out that the terms of the stay order cannot be considered conclusive as to the rights of Mississippi who was not a party to the proceedings in the court below prior to the time it was permitted to intervene in this case when Interstate sought the distribution of funds (R. 67, 71). It also is important to bear in mind that the provisions of the order did not bind the court below to return the funds to any particular group or class. In exercising its equity powers the court below entered into no contract or understanding as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity. \* \* \* *United States v. Morgan*, 307 U. S. 183 at 194.

### Conclusion.

The judgment of the court below should be affirmed as to Mississippi because to do otherwise would allow accomplishment by indirection the award of reparations against a natural-gas company contrary to the intent of Congress.

Respectfully submitted,

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Corporation, a Respondent

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION, *et al.*

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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**BRIEF FOR MEMPHIS NATURAL GAS  
COMPANY.**

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January 4, 1949

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OCTOBER TERM, 1948.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT.

---

**BRIEF FOR MEMPHIS NATURAL GAS  
COMPANY.**

**The Opinion Below.**

The opinion of the United States Court of Appeals for  
the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

## Jurisdiction.

The order of the Court of Appeals was entered on May 12, 1948 (R. 109-112). The petition for a writ of certiorari was filed on June 21, 1948, and granted on October 11, 1948 (R. 118-121). The jurisdiction of this Court rests upon 28 U. S. C. A. §1254.

## Introduction.

This case involves the distribution of funds impounded pending legal review of an order of the Federal Power Commission reducing interstate rates charged by the Interstate Natural Gas Company, Incorporated (hereinafter called "Interstate"). The order of the Commission reducing these rates was sustained by this Court in the case of *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682, decided June 16, 1947.

Thereafter, controversy arose as to the distribution of the fund representing the difference between the rates formerly charged by the Interstate Company and the rates as finally reduced.

Memphis Natural Gas Company (hereinafter called "Memphis Natural") was an interstate natural gas company which had purchased gas directly from the Interstate Company for resale to local distributing companies and others. Memphis Natural filed an intervening petition asking for re-payment of the excess rates paid by it which had been paid into the impounded fund. Other distributing companies which had purchased direct from the Interstate Company filed similar petitions (R. 49, 65, 71).

The Federal Power Commission, however, took the position that the impounded funds should be paid—not to the direct customers of Interstate—but to the ultimate con-

sumers who purchased gas from local distributors in intra-state commerce.

The Memphis Gas, Light and Water Division (hereinafter called "the Division") also intervened. The Division is an agency of the City of Memphis which purchases gas from Memphis Natural and distributes it locally to ultimate consumers in the City of Memphis. The Division asked that a part of the impounded fund be allocated and paid directly to it in proportion to the amount of gas which it had purchased from Memphis Natural.

The Circuit Court of Appeals for the Fifth Circuit, in which the Interstate rate case had been pending, heard all the intervenors, and on March 12, 1948, decided that the impounded funds should be paid to Memphis Natural and to the other direct customers of Interstate which had paid to Interstate the excess rates of which the fund was composed (166 F. 2d 796; R. 103). The court said (R. 105):

"A careful consideration of the opposing contentions, in the light of the undisputed facts, leaves us in no doubt that, whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect of such overpayments, it is not our function to search out or declare them.\* The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof."

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\* The court here dropped a footnote citing *Central States v. Mascatine*, 374 U. S. 138.

Applications for certiorari to this Court were thereafter made by the Federal Power Commission and some of the other intervenors. These applications were granted October 11, 1948 (R. 118-121).

### The Issue.

There is only one real issue in this case—namely, whether the decision of this Court in *Central States Company v. City of Muscatine*, 324 U. S. 138, should be overruled. The Commission's brief in effect concedes this, saying (C. Br., p. 9):

“We are constrained primarily to contend, however, that *Central States* should be overruled \* \* \*.”

The Commission as a secondary argument also raises some points under which it contends that the *Central States* case might be distinguished. But, as we shall show, these distinctions are either unsubstantial or non-existent.

Moreover, the Commission itself admits (C. Br., p. 9)\* that these distinctions—even if allowed—would not achieve the Commission's real purpose—namely, to pass over all the intervening companies and pay the impounded fund directly to the ultimate consumers—automatically and *in toto*—without hearing and regardless of the rate of return earned by the intermediary companies.

The Commission's brief admits that unless the *Central States* case is overruled, the distinctions suggested would only result in passing the refund to the distributing companies who buy directly from Memphis Natural, and not to the ultimate consumers themselves (C. Br., p. 9).

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\* The brief of the Federal Power Commission will be referred to herein as “C. Br.”

## Description of Memphis Natural.\*

Memphis Natural is a natural gas company within the meaning of the Natural Gas Act. It buys gas from various sources including Interstate Natural Gas Company, Inc. (R. 36-37). It has a pipe line 305 miles long (R. 33). It sells to the following customers (R. 33-34, 56):

Louisiana Power and Light Company, a distributor—

Arkansas Power and Light Company, a distributor—

Mississippi Power and Light Company, a distributor—

West Tennessee Gas Company, a distributor—

Memphis Light, Gas and Water Division of the City of Memphis—an agency of the City of Memphis which acts as a distributor of gas to the consumers in that city—

Memphis Generating Company, a private corporation which is an industrial user of gas.

The amount of excess rates paid to Interstate by Memphis Natural or for its account during the impounding period is \$592,465.82.

This amount includes certain sums which had been paid to Interstate but not actually deposited in the fund; and certain sums paid by United Gas Pipe Line Company for the

\* On April 9, 1948, Memphis Natural Gas Company and Kentucky Natural Gas Company were merged, the continuing corporation (called Texas Gas Transmission Company) succeeding to all the rights and liabilities of the predecessor corporations. For the purposes of this brief, however, and in order to avoid confusion, Memphis Natural Gas Company is treated as though it had continued its separate existence.



account of Memphis Natural but which United was in turn obligated to pay over to Memphis Natural (R. 43, 111).

There is no dispute concerning this amount, and the order of the court below directed this amount to be paid to Memphis Natural (R. 110, 111).

### History of Case.

The order reducing the rates charged by Interstate was entered April 27, 1943. An appeal was filed with the Circuit Court of Appeals for the Fifth Circuit, and an order was entered permitting Interstate to continue to charge the pre-existing rates on condition that the excess be impounded.

At about the same time, discussions had been going on between the Federal Power Commission and Memphis Natural which resulted in the filing of a new schedule of rates by Memphis Natural on August 9, 1943. These rates were approved by the Federal Power Commission and became effective as of July 26, 1943 (R. 31).

The Commission found that  $6\frac{1}{2}\%$  upon the investment would be a fair and reasonable return which Memphis Natural was entitled to earn, and the new schedules reduced the rates of Memphis Natural to a point which the Commission believed would permit Memphis Natural to earn that  $6\frac{1}{2}\%$ .

Neither the schedule of rates so filed by Memphis Natural nor the order of the Commission approving these rates made any provision for any change in rates in the event that the reduction of the Interstate rates should be upheld by the courts, nor any provision for the payment of the impounded fund or any portion thereof to customers of Memphis Natural.

The impounding period lasted from June 15, 1943, through October 1947. This was a period of rapidly changing conditions due to the tremendous inflation in wages and in the cost of materials caused by the Second World War.

The Interstate rate reduction order was sustained by the Circuit Court of Appeals for the Fifth Circuit August 3, 1946 (156 F. 2d 949).

Application was made by Interstate for certiorari and was denied by the Supreme Court on January 6, 1947 (329 U. S. 802). The application was renewed, however, and on February 10, 1947, certiorari was granted (330 U. S. 852), and on June 16, 1947, this Court affirmed the decision below approving the Interstate rate order (331 U. S. 682; rehearing denied, 332 U. S. 785).

After the reduction of the rates of Interstate had been affirmed by the Circuit Court of Appeals, Memphis did not make any corresponding reduction in its own rates. On the contrary, on October 31, 1946, it filed new rate schedules which in effect amounted to an application for an increase. This application for an increase was later withdrawn by a letter dated January 20, 1947, and approved by the Commission February 4, 1947 (C. Br. 57). The Commission, on the other hand, did not require Memphis to reduce its rates to reflect the reduction in the rates of Interstate.

The mandate of this Court, following its affirmance of the Commission's order in the Interstate rate case, was ~~filed~~ in the Circuit Court of Appeals October 21, 1947. (R. 15), and a motion for the distribution of the impounded funds was filed by Interstate in the Circuit Court of Appeals December 22, 1947 (R. 16).

Memphis Natural moved to intervene January 26, 1948 (R. 42), and various other intervenors filed petitions at or about the same time.

The Circuit Court of Appeals rendered an opinion March 12, 1948, to the effect that the impounded funds should be paid over to the immediate customers of Interstate, including Memphis Natural, and rejected the Commission's contention that it should be paid to the ultimate consumers (R. 103; 166 F. 2d 796).

The case now comes before this Court on certiorari which was allowed October 11, 1948 (R. 118-121).

### **Outline of Argument.**

We agree with the Commission's brief, that the principal question presented to the Court is whether to repudiate or reaffirm the *Central States* case.

This respondent contends that the *Central States* case is sound and should be reaffirmed, because to by-pass Memphis Natural and pay the impounded fund to the ultimate consumers would amount to a revision by the Court of the rates of Memphis Natural and the rates of all the distributing companies which buy gas from Memphis Natural, (1) for which revisions no factual basis has been established, (2) which would be retroactive and hence unauthorized by law, and (3) which would in any event be beyond the jurisdiction of the Court.

The Commission's primary contention is that the purpose of the Natural Gas Act (which the Commission contends is to protect the ultimate consumers) would be defeated if the fund is not paid to the consumers. This is unsound because the Natural Gas Act does not operate to give the ultimate consumers the benefit of a reduction in wholesale rates charged by a natural gas company to an intermediate company, by a direct grant to them of the amount of the reduction. The consumers are benefited by such reduction if and to the extent that it makes possible a prospective reduction in the rates of any intermediate

natural gas company and of the distributing company. Such reduction in the rates of such intermediate companies is made possible if and to the extent that the earnings of such intermediate companies, after giving effect to the wholesale rate reduction and all other factors affecting earnings, are in excess of a fair rate of return.

The Commission's contention that the impounded fund should be paid directly to the consumer by order of the Court is also unsound because it involves an alteration of the rates charged by Memphis Natural to its customers without compliance with the procedure laid down by the Natural Gas Act therefor—namely, a hearing before the Commission as to whether Memphis Natural is earning in excess of a fair rate of return, with a right in Memphis Natural to have the findings and conclusions of the Commission reviewed by the courts.

The argument of the Commission is made up of a fallacious assumption of law, that consumers are entitled to receive the reduction in wholesale rates of the natural gas company, as such, without any demonstration (in a properly conducted rate case) that the resulting rates of the intermediate companies are excessive.\*

\* At least the Commission makes this assumption in cases where the amount of the reduction has been impounded by the court pending the determination of an appeal from the rate order. The Commission has not suggested that the intermediate companies must, after the rate reduction order has been affirmed and the impounding ended, pay to the ultimate consumer the amount of the reduction in wholesale rates, as such, without reference to the adequacy of their own rates. But any legal doctrine that would permit the Court to order the impounded fund paid directly to the consumers, would also permit the Court to order the entire reduction, past and prospective, to be so paid, which obviously the Court cannot do. Thus, even the Circuit Court of Appeals which decided the earlier phases of *Central States* and thought it had power to pass the impounded fund directly to consumers—did not think it had any power to order the local distributing company to lower its prospective rates to the consumer *pro tanto*. *Natural Gas Pipe Line v. Federal Power Commission*, 141 F. 2d 27 (C. C. A. 7th 1944).

The argument of the Commission also includes an unwarranted assumption of fact, that the earnings of the intermediate companies, after giving effect to the savings resulting from the rate reduction, would be in excess of a fair rate of return. This fact has not been established, either in the manner required by the Natural Gas Act or otherwise, and we will demonstrate below the unsoundness of this assumption so far as Memphis Natural is concerned.

The Commission seems to be on the horns of a dilemma: on the one hand, the Commission finds it necessary to establish that the intermediate companies would be earning in excess of a fair rate of return if they are permitted to retain the proceeds of the rate reduction. On the other hand, it realizes that this fact has not been established in the manner prescribed by the Natural Gas Act. Consequently it is driven to assume the fact.

The Commission also knows that the Court has no jurisdiction to fix the rates of a natural gas company or of a distributing company and is consequently driven to argue that for the Court to pay the impounded fund to the ultimate consumers is not changing the rates to such consumers.

The Commission now urges upon the Court—as it unsuccessfully urged in the *Central States* case—that the orderly procedure contemplated by the Natural Gas Act be abandoned and that the Court should itself assume a rate-making function and, either by a series of rate reductions of the intermediate companies or by treating the intermediate companies as nonexistent, put the savings occasioned by the wholesale rate reduction directly into the hands of the consumer, without inquiry into or reference to the reasonableness or unreasonableness of the earnings of the intermediate companies.

## ARGUMENT

### THE *CENTRAL STATES* CASE GOVERNS THIS CASE AND SHOULD NOT BE OVERRULED.

#### I.

#### **The *Central States* case governs this case.**

The case of *Central States Co. v. City of Muscatine*, 324 U. S. 138, was decided by this Court in 1945.

In the *Central States* case, as in this case, an order of the Federal Power Commission reducing rates was suspended pending appeal, the difference between the existing rate and the suspended rate being impounded by the court.

In both cases, at the end of the litigation, the Federal Power Commission attempted to impose a new theory of law—namely, that whenever a wholesale rate of a natural gas company has been reduced—the whole series of intermediate companies which derive their gas directly or indirectly from the original company—must be treated as though they did not exist and the impounded saving paid automatically and *in toto*—to the ultimate consumers. And all this without any investigation of the rights of the intermediate companies who actually paid in the money—regardless of

- the earnings of the intervening distributors,
- the changes in their earning power brought about by lapse of time,
- the question whether their rates are subject to any regulation by the Federal Power Commission or a state administrative authority.

The passing on is “presumed” to be “equitable”.



No hearing—no order—and none of the usual indicia of due process are necessary or permitted.

The decision of the Supreme Court in the *Central States* case rejected that doctrine.

It held that

(1) Such passing on necessarily involved the legislative function of rate making—which was beyond the power of the court.

(2) Neither has the court any power to fix rates under general equitable principles

“This, because the court below had no power as a court of equity to fix rates, \* \* \*” (324 U. S. at 144).

(3) This is especially true where the rates so fixed are intrastate rates, subject to state law—but the decision is not restricted to such cases. It denies broadly that such action is a proper function of a Court of Equity.

## II.

**The decision in the *Central States* case is sound and should be followed.**

**1. Consumers of natural gas receive the benefit of reductions in wholesale rates effected under the Natural Gas Act, not by direct payment to them of the amount of the reductions, but by the reductions in intermediate wholesale and retail rates made possible thereby.**

(a) The Natural Gas Act empowers the Federal Power Commission to regulate interstate rates only, not local rates.

The Act applies

“to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natu-

ral gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, \* \* \* (15 U. S. C. A. §717(b)).

The Act empowers the Commission, upon complaint or on its own motion, by hearing to inquire into the reasonableness of rates and, when it has found existing rates to be unreasonable,—to fix rates thereafter to be charged (15 U. S. C. A. §717(d)).

It requires natural gas companies to file their rate schedules and to abide by the schedules as filed. A natural gas company desiring to increase its rates must file the increased rate schedules, and the Commission is empowered to suspend such rates pending its inquiry into their reasonableness (15 U. S. C. A. §717(c); F. P. C. Reg. §154.21, 13 Fed. Reg. 5215 Sept. 8, 1948.)

The rate-regulating power of the Commission is expressly confined to rates for transportation and sales of natural gas which are subject to the jurisdiction of the Commission, *i.e.*, rates for the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale for public consumption. For convenience the rates to which the jurisdiction of the Commission applies are referred to in this brief as "wholesale rates."

The rate-regulating jurisdiction of the Commission, so far as sales of natural gas are concerned, is confined to regulating the wholesale rates of natural gas companies—that is, the amounts charged by natural gas companies to their immediate customers for gas sold to them.

The Commission under its rate regulatory jurisdiction has no power to do anything except to require a natural

gas company, in a proper case, to reduce its rates to its immediate customers. It obviously cannot order the natural gas company, whose rates have been found to be excessive, to continue to charge its customer such excessive rates and to pay the amount of the excess to the ultimate consumer.

If the customer is also a natural gas company, subject to the Natural Gas Act, the Commission can also (simultaneously or at any other time) inquire into the rates of the customer to see if its earnings (as affected by the reduction and all other factors) are excessive and, if so, to reduce its rates. If the customer, however, is a distributing company not subject to the Natural Gas Act, the Commission must leave this second step to the state regulatory authorities.

**(b) The courts have jurisdiction only to review the orders of the Commission.**

The jurisdiction of the court is even more limited. The federal court cannot fix or regulate any rates, even those of a natural gas company which is subject to federal regulation. It can only review the orders of the Commission.

Accordingly there is no power in the court to force a natural gas company to reduce its rates and *a fortiori* it has no power to take the benefit of a rate reduction by a natural gas company ordered by the Commission away from the customer whose rates were reduced and give it to someone else, including the ultimate consumer.

If a rate reduction by the Commission is appealed to the court, and a stay of the Commission's order is requested, the court can either (1) stay the order and permit the natural gas company to continue to charge the old rate during the period of the appeal, thus creating an obligation

on the part of the natural gas company to refund the excess to its customers if the Commission's reduction is upheld, or (2) refuse to stay the order, thus creating an obligation in the customer to pay the additional amount if the Commission's reduction is not upheld, or (3) impound the amount in dispute to abide the outcome of the appeal. In such case the impounded fund can only belong to the natural gas company or its customer. Just as the court has no power to give anyone other than the customer the benefit of the rate reduction as a whole, so the court cannot give anyone other than the customer the benefit of that portion of the rate reduction which has been impounded. The court cannot lift itself by its own bootstraps by impounding the fund.

These principles are just as applicable to the present case as they were to the *Central States* case.

**2. The Commission's theory—that reductions in the cost of gas must automatically—without more—be reflected in a corresponding reduction in the rates of intermediate distributing companies—necessarily involves an exercise of the rate making function.**

The distribution of natural gas involves a very complex mechanism.

The usual pattern is for producing companies, which own gas wells, to sell the gas to pipe line companies (usually interstate and consequently subject to the Natural Gas Act). These in turn sell to other pipe line companies, to local distributing companies and sometimes to industrial users. The local distributing companies sell to the ultimate consumers and to this extent are subject, not to the Natural Gas Act, but to state regulation.

The costs of operation involve many other factors besides the cost of gas. This Court can take judicial notice that during the period under review in this case all costs, labor, materials, operations, maintenance, depreciation, have been rapidly rising because of war and inflation.

Each of the companies involved in the successive steps of distribution is subject to federal or state rate regulation, publishes schedules of rates and files them with the regulatory commissions, and is compelled to adhere to those rates.

Due and orderly processes are provided by law for changes in rates. Rate increases at the instance of the company generally require the filing of new schedules of rates with the regulatory commission, with the power in such commission to suspend the rates pending inquiry into their reasonableness. Reductions in rates can be effected by the regulatory commission, upon complaint or upon its own initiative. These require hearings before the commission, findings by the commission upon the reasonableness of the rates and an order of the commission, with a right in the company to appeal from the order to the courts.

In the present case—the Commission's theory that the impounded fund should be paid to the consumers would in the first instance compel a reduction in the scheduled rates of Memphis Natural to its customers.

In the second stage of distribution it would require a reduction of the rates charged by the customers of Memphis Natural to their local distributors.

In the third place it would require a reduction in the local intrastate rates charged by the local distributors to the ultimate consumers.

These rate schedules have been outstanding and effective during the impounding period and any such reduction



as the Commission asks would constitute a violation of those schedules. It would be, in effect, either a rate reduction or a reparation order.

It is idle to pretend—as does the Commission—that for the Court to order the impounded fund to be paid to the ultimate consumers does not involve rate making. Rates are the prices charged and paid for gas. The Interstate rate, which was reduced, is the price paid by Memphis Natural and others to Interstate for gas. The Memphis Natural rate is the price paid by the customers of Memphis Natural to it for gas. The retail rates are the prices paid by the consumers to the local distributors for gas.

If the Court orders the impounded fund to be paid to the ultimate consumers, such payment can be nothing else but a reduction in the price theretofore paid by the consumers for gas purchased by them. The consumers can be entitled to the payment only on the theory that the rates charged them for the gas during the impounding period were too high by reason of the Interstate reduction and that therefore they are entitled to have such rates reduced. By the same token, if the Court orders a portion of the impounded fund paid to the City of Memphis, such payment can only be a reduction in the price of gas theretofore paid by the city to Memphis Natural. Clearly, such an order would be a change in the rates paid by the ultimate consumer or by the City of Memphis.

The fact that such reduction in the price of gas is not reflected in the rate schedules filed with the regulatory commissions does not alter the fact that the rates paid by the customers have been changed. Indeed this fact merely further indicates the illegality inherent in the change in rates contended for by the Commission, since it involves a departure from the filed rate schedules.



The fact that Memphis Natural is entitled to a reduction in the rates which it pays to Interstate has been decided in the manner expressly provided by the Natural Gas Act, but whether customers of Memphis Natural are entitled to a reduction of the rates they pay to Memphis Natural (whether during or after the impounding period) has not been so decided.

The latter is a wholly different question, depending upon wholly different facts. And the question whether consumers who bought from local distributors are entitled to lower rates depends upon another wholly different set of facts. The parties affected are entitled to have these questions decided after hearing and by due process. Their rights—involving such large sums of money—are not to be determined summarily on the basis of mere assumptions.

Even the Commission does not contend that the order of this Court affirming the reduction of the rates of Interstate has the effect of reducing the rates of all the subsequent distributors prospectively.\*

What the Commission is contending—in effect—is that it reduces all of these rates retroactively.

It is contending either for a series of retroactive rate reductions—or for a series of reparation orders—without hearings in either case.

What the Commission asks is a swift and summary rate reduction which will relieve it of the necessity and inconvenience of proving that such a rate reduction is proper.

Such an action is rate making and nothing else.

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\* See *Natural Gas Pipe Line Co. v. Federal Power Commission*, 141 F. 2d 27, 29 (C. C. A. 7th. 1944).

3. Even the Commission would have no power to (1) prescribe retroactive rates; (2) award reparations; (3) regulate the intrastate rates of the retail distributors; (4) regulate rates for industrial users.

The Commission itself concedes that it has no power to prescribe retroactive rates or award reparations (C. Br., p. 60). This is expressly forbidden by the Act and this Court has so stated in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 618, saying:

"It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'"

It is also clear that it has no power to regulate rates in intrastate commerce. This was also decided in the *Hope Natural Gas* case, *supra*, where this Court said, 320 U. S. 609-11:

"\* \* \* the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' \* \* \* In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.'"

The Commission also concedes that it has no power to regulate rates for industrial users (C. Br. 51). This Court has so held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 517.

**4. The courts have no power to exercise the legislative function of rate making**

The power of the courts is even more limited than that of the Commission. The courts have no rate making power of any kind—under any circumstances or for any purpose.

The jurisdiction of the court under the Natural Gas Act is stated as follows:

“Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part” (15 U. S. C. A. §717r(b)).

This Court has repeatedly held that rate making is outside the jurisdiction of the courts.

*Newton v. Consolidated Gas Co.*, 258 U. S. 165; 177:

“Rate making is no function of the courts and should not be attempted either directly or indirectly.”

*Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196. Speaking of rates, this Court said:

“So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.”

*Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F. 2d 388, 390-391 (C. C. A. 5th 1947):

“Rate making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function.”

To the same effect see *Central States Co. v. City of Muscatine*, 324 U. S. 138, at 144.

**5. The courts cannot make rates indirectly, under the guise of exercising equity powers or imposing conditions for relief.**

This is no new question. It arose as early as 1922 in *Newton v. Consolidated Gas Co.*, 258 U. S. 165. In that case the court as a condition of a stay-order directed that the excess be impounded until it could be distributed in accordance with the rates thereafter to be newly established by the Public Service Commission. The Supreme Court said:

*"It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts and should not be attempted either directly or indirectly."* (p. 177).\*

In *Central Kentucky Natural Gas Co. v. Railroad Commission*, 290 U. S. 264 (1933), this Court reversed a decree below which had refused to stay a Commission order reducing gas rates unless the company would agree to file a rate intermediate between the rate fixed by the Commission and the rate previously existing. This Court held that while in some cases equitable relief might be denied to the applicant except upon conditions nevertheless this doctrine did not go so far as to permit a court in effect to exercise the rate making function, saying:

*"There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority be-*

\*Italics in quotations throughout are ours unless otherwise specified.

cause forbidden by the Fourteenth Amendment, but *they are without authority to prescribe rates* \* \* \* because it is not one within the judicial power conferred upon them by the Constitution. \* \* \* The practical effect of a denial of relief unless the plaintiff will submit to a rate, the reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity." (pp. 271-72).

Thus in the *Central States* case this Court is merely following well settled principles when it states, 324 U. S. at pp. 143-44:

"It [the petition of the Central States Company] further attacked the jurisdiction of the court to award the sum to Central's ultimate consumers since such an award amounted to a retroactive reduction of local rates to which the Natural Gas Act, by express terms, did not apply, and, finally, asserted that the court ought not to make the award based on a conclusion of fact unsupported by any evidence that the burden of the excessive rates had been passed on to the consumers whereas the court, at the same time, disclaimed jurisdiction to determine the reasonableness of local rates and, therefore, refused to hear evidence of Central's equitable right to the fund. \* \* \*

"The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power

upon it, to fix or adjust Central's rates, that being a legislative function of the State of Iowa. This would be so where the fund in dispute came into its possession in a proceeding to enjoin the operation of an order affecting state rates, and must be equally true where the proceeding was one to enjoin collection of a rate for interstate service. This, because *the court below had no power as a court of equity to fix rates*, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa. The court below so held in this case, and has dealt with the matter more fully and to the same effect in another.\*"

This Court in the *Central States* case also relied upon another well settled doctrine of privity, namely, that refund should be made to those who had actually paid in the money and not to those who had only a remote and speculative relationship to the transaction. It pointed out, 324 U. S. at 145:

"Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers."

In so holding, it merely cited and followed an earlier decision of Mr. Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzler Co.*, 245 U. S. 531, 533-34, in which this Court held:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. . . . If it be said that the whole transaction is one from a business point of view, it is enough to reply that

\* *Natural Gas Pipeline Co. v. Federal Power Commission*, 141 F. 2d 27 (C. C. A. 7th 1944) [footnote by the Court].



the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. \* \* \* The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co. v. Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the *endlessness and futility of the effort to follow every transaction to its ultimate result.*

In *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railroad Company*, 284 U. S. 370, this Court again stated this rule of privity, saying at page 383:

"The exaction of unreasonable rates by a public carrier was forbidden by the Common law. \* \* \* The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained."

Similarly, in *Adams v. Mills*, 286 U. S. 397, Mr. Justice Brandeis, speaking for the Court, held that where unloading charges had been held unlawful by the Interstate Commerce Commission the railroad must repay the charges to the commission merchants who actually made the payments, saying:

"If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable

to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. . . . As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. See *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534. . . .

This Court recognized the long standing approval which has been accorded this doctrine in a case in which it ordered the return to shippers of freight rate excesses which had been paid by the shippers, pending the determination of the validity of a rate reduction order; in *Arkadelphia Co. v. St. Louis S. W. Railway Co.*, 249 U. S. 134, this Court said at page 145:

"But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error be restored to all things which he hath lost by occasion of the said judgment; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued."

**6. The cases cited by the Commission do not support its theory or justify reversing the *Central States* case.**

It is noteworthy—and we emphasize this point—that the Commission has not cited a single case where the courts compelled the refunding of money to anyone who had not personally and directly paid it.

This is important—indeed it is crucial—to the Commission's argument.

The Commission is here asking the Court to abandon the well settled doctrine of privity—and to distribute the fund to persons who have no direct property interest in it and no enforceable claim against it. In every case cited by the Commission where money was refunded, it was repaid to those who had paid it in the first place.

Typical of these cases are: *United States v. Morgan*, 307 U. S. 183, and *Inland Steel Co. v. United States*, 306 U. S. 153.

In fact, as this Court pointed out in the *Central States* case, 324 U. S. 138, 145, it regarded those cases as authorities for paying over the impounded fund in that case to the Central States Company. For the same reason they are authorities for paying over the fund in this case to Memphis Natural.

The class action cases—where distribution is made to all the members of the class who contributed to a fund, and not merely to those who actually intervened and demanded payment—are also irrelevant. It would be unreasonable to require every member of the class personally to bring suit.

The case of *Ex parte Lincoln Gas & Electric Company*, 256 U. S. 512, is merely a case of that character.

The money impounded was paid back to the individuals—consumers in that instance—who had directly paid it to the gas company and were in privity with it. The gas company had sued the city government to set aside an ordinance reducing rates and the Court merely allowed the consumers whose money had been impounded during the litigation to have the benefit of the judgment sustaining the ordinance, without the bringing of innumerable personal suits for restitution. But all the consumers as a class were clearly in privity with the fund.

Cases upholding statutes which deny or regulate the refunding of taxes (which have been unconstitutionally collected) where the taxes have been shifted to subsequent purchasers, also have no bearing on this case. The procedure there is prescribed by statute. It involves no extraordinary extension by the court of its own powers. The following cases cited by the Commission are of this statutory tax character: *United States v. Jefferson Electric Co.*, 291 U. S. 386; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

The cases stating that where the court has taken possession of property in the course of litigation it has power to determine the rights of those who assert liens or other direct property interests in it or claims against it are also irrelevant. The cases of *Hoffman v. McClelland*, 264 U. S. 552; *Oklahoma v. Texas*, 258 U. S. 574, and other cases cited in the Commission's brief at p. 19 are cases containing statements of this character.

The ultimate consumers in the present case have no interest in or claim against the fund as such.

The ultimate consumers are in no better position than the ultimate consumers referred to by Mr. Justice Holmes in the *Darnell-Taenzler* case, *supra*. The ultimate consum-

ers would not have been entitled to bring suit against the Interstate Company or Memphis Natural directly. For the same reason they have no right to proceed against the fund.

The mere fact that the Interstate rate reduction may result in a reduction in the costs of Memphis Natural Gas Company or secondarily in the costs of distributors who purchase from it, and thus might eventually permit a reduction in the rates paid by consumers, does not give the consumers an interest in or a claim against the fund as such which a court of equity can measure and determine. It merely gives them the right to anticipate that the rate-making machinery set up by the Natural Gas Act will function to bring about a rate reduction to them if one proves to be justified.

The courts have wisely refused to follow the consequences of rate-making beyond their first impact and to attempt to give rights of action to persons who may be affected only in a speculative and consequential manner. Whatever interests they have are not proximate. They are too remote. As Mr. Justice Holmes wisely said in the *Darnell-Taenzer* case, *supra*,

“Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result.”

There is another well defined class of cases in which this Court has refused to give affirmative relief where the result would be to aid and abet achieving some illegal end—such as the collection of a rebate. Cases of this class cited by the Commission are:



*Atlantic Coast Line v. Florida*, 295 U. S. 301;  
*General American Tank Car Corp. v. Eldorado  
 Terminal Co.*, 308 U. S. 422 (in which the opin-  
 ion was written by Mr. Justice Roberts, who  
 later wrote the majority opinion in the *Central  
 States* case);  
*Inland Steel Co. v. United States*, 306 U. S. 153.

In the *Inland Steel* case, for example, Mr. Justice Black,  
 speaking for the Court, said (306 U. S., at 158):

"When the court finally determined that the admin-  
 istrative findings and order were correct, appellant  
 could claim an interest in the fund only by asserting  
 a right to payments forbidden by law; and it became  
 the duty of the court promptly to allocate the fund  
 to its lawful owner."

In the *Atlantic Coast Line* case the Interstate Commerce  
 Commission had found that certain rates were discrimina-  
 tory, but its order was technically defective. The Court,  
 after the Commission had cured the defect, refused to per-  
 mit a shipper to sue for restitution of sums paid by him in  
 obedience to the technically defective order—where the  
 result would have been to enable him to enjoy the fruits of  
 that discrimination. The Court said that the Commission  
 had in fact found inequality and injustice and that

"\* \* \* restitution is without support in equity and  
 conscience \* \* \*

"In the exercise of that power it [the court] is not  
 required to lend its aid in perpetuating a forbidden  
 practice. \* \* \* All that the Federal court does is to  
 announce that it will stand aloof. \* \* \* This is not  
 usurpation. It is not action of any kind. It is mere



inaction and passivity \* \* \* (Cardozo, J., pp. 313, 314-15).

The *Inland Steel* case, *supra*, was another case involving allowances in the nature of rebates which had been granted to the petitioning Steel Company. The Interstate Commerce Commission found these allowances illegal, and ordered their discontinuance, but the district court temporarily postponed the effective date of the order. The Steel Company sued to recover the amount of the allowances, which had been kept by the Railroad in a separate account. The Court rejected the claim. It held that the original determination of the Commission that the allowances were illegal still stood and was a sufficient basis to justify the Court in refusing to compel an illegal payment.

The crux of the case is the statement (306 U. S. at 158) that

"When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, \* \* \*."

Similarly in *United States v. Morgan*, 307 U. S. 183; 313 U. S. 409. Stockyard rates had been held excessive by the Secretary of Agriculture, and the excess impounded during the appeal. The order had a procedural defect, which was shortly cured, and the excess payments repaid to those who had paid them into the fund.

It is clear that in none of these cases did the Court itself exercise any administrative function. *In every case there was an administrative finding upon which the action of the Court was based.*

Moreover, in every case dealing with impounded funds the funds were paid over to those by whom they were paid in.

Every one of those cases is consistent with the opinion of Mr. Justice Holmes, speaking for this Court in *Southern Pacific Co. v. Darnell-Tachler Co.*, 245 U. S. 531, in which he said (p. 534):

"If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. \* \* \* Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result."

**7. The Court cannot determine what would be "equitable" upon the basis of mere presumptions.**

The Commission, in effect, is asking the Court to pass this large sum of approximately \$600,000 over to the ultimate consumer *in toto* on the mere assumption—without proof or even hearing—that Memphis Natural and each of the intermediate purchasers from Memphis Natural has been receiving in excess of a fair rate of return during the impounding period.

The court should indulge in no assumptions on matters as substantial as this.

Indeed the presumption—if any is to be indulged in—would be just the other way.

The Commission approved rates to be charged by Memphis Natural in April 1943—at approximately the same

time that it reduced the rates on the gas it purchased from Interstate.

The rates of Memphis Natural were established on a basis which it was estimated would *then* give Memphis Natural a net return of  $6\frac{1}{2}\%$  under the conditions *then* prevailing.

This was early in the war.

There is no presumption whatever that those rates continued to net Memphis Natural a fair return thereafter under the rapidly developing inflation due to war conditions.

The impounding period continued for nearly four years.

Those four years constituted one of the greatest periods of inflation that the country has ever seen.

Labor had successive rounds of wage increases. The cost of materials mounted sky high.

Meanwhile, throughout those four years of rising costs Memphis Natural received no increase in the rates it received from others.

What reason is there to suppose that a rate which would have been reasonably remunerative in 1943 continued so.

Indeed this Court, in rate cases and in other cases, has taken judicial notice of the effects of war—and inflation that accompanies and follows war.

For example, in *Lincoln Gas & Electric Light Company v. City of Lincoln, et al.*, 250 U. S. 256, 268, this Court said:

"It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and *largely since this cause was last heard in the court below.*"

In *Central Kentucky Natural Gas Co. v. Railroad Comm'n.*, 290 U. S. 264, 275, this Court said:

"That restriction [to findings as of December, 1926] also necessarily excluded from consideration the profound changes in values, cost of service, consumption of commodities and reasonable return on invested capital which we judicially know took place during the period of more than five years while the case was pending before the Commission and the court. See *Atchison, Topeka & Santa Fe Ry. v. United States*, 284 U. S. 248, 52 S. Ct. 146, 76 L. Ed. 273."

In *Atchison etc. Ry. Co. v. United States*, 284 U. S. 248, 260, this Court said:

"It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

And in *Old Colony Bondholders v. New York, N. H. & H. R.R.*, 161 F. 2d 413, 423 (C. C. A. 2d 1947), *cert. denied*, 331 U. S. 858, the Court took judicial notice of the rising costs of labor and material during the very period of impoundment in the present case—1943-47—saying:

"Indeed, if the closing date [of the bankruptcy plan] were to be advanced [from 1943] to 1946 or 1947 the change would probably be detrimental rather than beneficial to the appellant, for the court may take judicial notice that war earnings have ended and costs of labor and materials have advanced."

The Commission boldly and repeatedly, throughout its brief, makes the flat statement that the return to Memphis Natural has been adequate and that to allow it any refund

from the impounded funds will be "a pure windfall" and "unjust enrichment."

"\* \* \* there is no question as to the reasonableness of the rates of the purchasers for resale and hence no rate-making question" (C. Br. 10).

"The immediate purchasers who *earned a reasonable return during the impoundment* and who are in a position to receive their full share, receive a *pure windfall*" (C. Br. 11).

"\* \* \* do not involve any issue as to the reasonableness of rates during the impoundment period" (C. Br. 52).

"These findings indicated that the immediate purchasers earned a reasonable return during the impoundment period" (C. Br. 58).

"\* \* \* clearly an undeserved windfall" (C. Br. 61).

But on examination of the record, it is quite clear that the Commission has never made any such finding. It has never even had a hearing on the point.

It is merely asking the Court to *assume* that because Memphis Natural had had its rates approved by the Commission in 1943—those rates continued to net Memphis Natural a fair return throughout the war—and its accompanying inflation.

That assumption is wholly unsound.

The decision of this Court in the *Central States* case was rendered while the present case was pending below. Under the reasoning of that decision, any question as to the adequacy of return to Memphis was immaterial.

If, now, the *Central* case is to be overruled—as the Commission asks—then Memphis asks the opportunity to prove



the real facts as to the unremunerative character of the Memphis rates during the impounding period—which facts are matters of record in the files of the Commission—namely:

1. The rates prescribed by the Commission for Memphis Natural in 1943 did not permit Memphis Natural, at any time during the impounding period, to earn in its regulated business the 6½% return on its investment which the Commission assured them it would do.
2. Even if the entire amount to be now refunded were added to the net income of Memphis Natural during the impounding period, the average return of its regulated business during the period would be less than 6½%.
3. Memphis Natural did not receive any increase in rates during that period, despite increasing costs.
4. The application by Memphis Natural for increased rates in 1946 referred to in the Commission's brief (p. 57)—far from permitting an inference that the Memphis rates without the refund were reasonable—requires an exactly opposite inference.

This application for a rate increase was made October 31, 1946. At that time the *Central States* case had been decided—under which Memphis Natural would be entitled to the refund, if made. Also, the Circuit Court of Appeals had sustained the order of the Commission in the *Interstate* case by an opinion rendered August 3, 1946. Thus the application for an increase indicated that even with the reduction in costs resulting from the reduction of the Interstate rate—the earnings of Memphis Natural would still be inadequate.

The application of Memphis Natural for increased rates was withdrawn January 20, 1947, after this



Court had on January 6, 1947, denied the application for certiorari in the *Interstate* rate case (329 U. S. 802). It was withdrawn by Memphis Natural because it was urged to do so by representatives of the Commission on the ground that its earnings were going to be increased by the *Interstate* rate reduction which had seemingly been conclusively approved by the courts, including this Court.\*

Thus Memphis Natural at the time it applied for this further increase had every reason to suppose that it was already assured of the *Interstate* refund and of a corresponding reduction in the cost of gas purchased from *Interstate* in the future. It withdrew that application at the request of representatives of the Commission when the denial by this Court of the application for certiorari seemed to assure it that the *Interstate* reduction was an accomplished fact from which it would receive a substantial benefit.

Moreover, the Commission did not in 1946 or 1947—and has not since—made any attempt to reduce the rates charged by Memphis Natural to its customers to reflect the reduction in the cost of gas purchased by Memphis Natural from *Interstate*.

If this case is to be decided on the basis of inferences we submit that the only inference to be drawn from these events, namely, the filing of increased rates; their subsequent withdrawal at the request of the Commission after the *Interstate* rate reduction was an accomplished fact; and the failure of the Commission to require Memphis Natural to reduce its rates, even after the termination of the *Inter-*

\* Subsequent to such withdrawal this Court granted certiorari in the *Interstate* rate case on a second application and in due course affirmed the order of the Commission and the decision of the court below, 331 U. S. 682, rehearing denied, 332 U. S. 785.

state rate case and the impounding period, is that Memphis Natural's rates during the period in question, after giving effect to the Interstate rate reduction, did not yield Memphis Natural in excess of a fair rate of return and furnished no basis for a rate reduction by Memphis Natural.

The court in the *Panhandle* case\* was right when it said in its opinion—

“We think that, prima facie, the contribution of such a distributor is returnable to it.”

**8. The protection of the consumer does not require or justify the procedure sought by the Commission.**

The argument is made that the Court should pass this fund on to the consumers—automatically and *in toto*—because—so the Commission says—this is necessary to prevent unjust enrichment (C. Br. 59-61).

But the consumers ought not to get the money unless they are entitled to it. They are under no circumstances entitled to the money, as such.

They are not entitled to the rate reduction on the basis of the creation of the fund or of the Interstate reduction which gave rise to the fund, unless and until it has been determined in a legal manner

- (1) after due hearing, findings and order capable of judicial review;
- (2) by an agency qualified and empowered to pass upon the question

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\* *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, an unreported decision by the Circuit Court of Appeals for the Eighth Circuit similar to the decision in the *Central States* case.

whether the rates charged by Memphis Natural and by the subsequent distributors during this period have in fact netted more than a fair and reasonable return.

It seems clear that—at least as to interstate rates charged by Memphis Natural to distributors—the Commission could have held hearings, made findings and entered a regular order to the effect that rates to be charged by Memphis Natural to its customers in interstate commerce should be reduced to an appropriate extent as and when the rate from Interstate to Memphis Natural was reduced.

The Commission did not do so in 1943—and it has not done so since—although the question of the propriety of Memphis Natural's rates was brought sharply to the Commission's attention in 1946—by the application by Memphis Natural to increase its rates still further—*after* the C. C. A. had affirmed the Interstate rate reduction.

If the Commission had made such an order, Memphis Natural could have tried out the question of the adequacy of its return then or at any time thereafter.

But if this Court now overrules the *Central States* case and adopts the automatic conduit theory of the Commission—then Memphis Natural will never have an opportunity to demonstrate that it is not being “unjustly enriched.”

Thus Memphis Natural—who paid the money—will be left without a remedy.

It is being “assumed” that Memphis Natural will be “unjustly enriched” and Memphis Natural is being given no opportunity to prove the contrary.

The inconvenience of the Commission is not a valid reason why a court should disregard the vital safeguards of due process in order to favor one party against another. As said by Mr. Justice Cardozo, speaking for this Court in *Ohio*

*Bell Telephone v. Public Utilities Commission of Ohio*, 301 U. S. 292:

"Regulatory commissions have been invested with broad powers \* \* \*. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' \* \* \* of a fair and open hearing be maintained in its integrity. \* \* \*. The right to such a hearing is one of the 'rudiments of fair play' \* \* \* assured to every litigant \* \* \* as a minimal requirement."

*"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."*

The Commission argues that courts should "bow to the lessons of experience" (C. Br. 44).

But as Mr. Justice Cardozo said in the passage quoted above—if experience teaches us anything—it teaches that—

"The right to such a hearing is one of the rudiments of fair play."

and that it cannot be dispensed with merely for reasons of "~~convenience or expediency~~"—or to avoid delay.

The Commission suggests (C. Br., 23-24) that the stay order prevented the Commission from reducing Memphis Natural's rates on the basis of the Interstate reduction. It is difficult to understand the Commission's belief in such a limitation upon its own powers. Certainly, under the broad administrative powers held by the Commission, it could—after proper hearing as to the reasonableness or excessiveness of the Memphis Natural earnings and after finding that Memphis Natural's rates would be too high if Memphis Natural received the Interstate rate reduction—have ordered a reduction of the Memphis rates contingent

upon the becoming effective of the Interstate reduction. It could also have provided in such order that Memphis should, in the event that the Interstate rate reduction is subsequently upheld, refund to its customers the appropriate portions of the rates paid by them during the impounding period.

### III.

**The alleged distinctions between this case and the *Central States* case are not substantial.**

**1. The distinction that in the present case the immediate purchasers who directly contributed to the impounded fund were engaged in interstate commerce.**

It is difficult to understand in principle why this should make any difference under the Commission's theory of the law.

Under that theory—every rate reduction by a wholesale distributor of gas should automatically and *in toto* pass on through each subsequent distributor to the ultimate consumer. The ultimate consumer is presumed to have a right to it and that presumption is conclusive. The courts—so the Commission says—should enforce that “right” on “general equitable principles.”

Under that theory—it is wholly immaterial whether the later steps of the distributive process are intrastate in character and beyond the power of federal regulation. The money should pass on anyhow.

That theory was rejected by this Court in the *Central States* case.

The Commission now seeks to distinguish this case from the present case on the ground that in the *Central States*

case the *immediate* purchasers were retailers engaged in intrastate distribution, whereas in this case the *immediate* purchasers from Interstate were themselves wholesalers and engaged in interstate commerce.

But the fact is that in this case also—the ultimate purchasers are local intrastate retailers beyond the reach of regulation by the Federal Power Commission—and even the interstate distribution of gas for industrial purposes is also free from Commission rate regulation.

The Commission concedes that this distinction would merely pass the refunded money from Memphis Natural to its distributors (who, to say the least, have less right to it than Memphis Natural has). The Commission does not claim that this distinction would give the ultimate consumer the money. It merely has hopes that through the customers of Memphis Natural the money would be passed on to the consumers.

The Commission merely hopes that “some part of the fund”—would “probably” reach the ultimate consumer (C. Br., 17; 49).

This is, to say the least, to indulge in speculation at the expense of Memphis Natural, who actually paid the money.

Even the Gas Division of the City of Memphis—the only distributor buying from Memphis Natural which has filed a certiorari petition—does not promise to distribute what it gets to the ultimate consumer. Its claim is not based on that at all.

The Division claimed in its intervening petition that it should receive its pro-rata share upon the ground that

“it is the ultimate consumer”

and that it (*i. e.*, the Division itself)

“is the person entitled to \$387,347” (R. 26).



It contended that it (*i. e.*, the Division) was

“the ultimate customer under the meaning of the Natural Gas Act” (R. 28).

This although the Division is in fact a retail distributor selling gas to consumers in the City of Memphis.

The Commission concedes that the state authorities have no power to compel the local distributors to pass the money on at this time, as the case now stands, either by retroactive rate reductions or by reparation orders (C. Br. 60).\*

The situation is not unlike that presented in the case of *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456. In that case the Ohio Public Utilities Commission attempted to fix retroactively the rates charged by an interstate gas distributor to an intrastate distributor in Ohio. The Court, speaking through Mr. Justice Frankfurter, said (p. 464):

“The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the statute book concluding that the Commission’s orders can be retroactive to the date when the Commission’s inquiry into the rates was begun; on the contrary the explicit language of the statute precludes such a construction.”

However, it is not the fact that the decision in the *Central States* case depended upon the fact that the immediate purchaser (as distinguished from the later purchasers) was engaged in interstate commerce.

The decision was much broader than that—it held squarely that the method of distribution asked for by the

\* See Williams Tennessee Code Annotated 1941, and 1948 Supplement § 5450(e).

Commission was, in effect, an exercise of the legislative power of rate making and as such not properly within the equity power of the Court. It refused to indulge in rate making indirectly, under the guise of general equitable principles. It refused to assume that the refund would result in unjust enrichment—or that a reduction of the rates of the first distributor would necessarily have been followed by a reduction of the rates of subsequent distributors. The Court also held that the Commission's theory would result in intrastate rate making as well—but the decision is broader than that. The Court expressly stated that it affirmed the right of the *Central States Company* to receive the refund on two grounds, saying (324 U. S. 138, at 143-144):

“This, because the court below had no power as a court of equity to fix rates \* \* \*

and then continuing as a further reason—

“\* \* \* and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa.”

As we have already shown—*supra* pp. 15-19, the refunding of this money to the immediate customers of Memphis Natural would be a departure from its scheduled rates—in the nature of a retroactive rate reduction or a reparation order—and beyond the power of the Commission at this time.

**2. The attempt to distinguish the *Central States* case on the ground that in this case Memphis Natural has already received a reasonable return—is unfounded.**

The Commission's brief attempts to distinguish the present case from the *Central States* cases by arguing that

in the *Central States* case the immediate purchaser was not earning a fair return—while in the present case the immediate purchaser—Memphis Natural—was doing so.

This is not the fact.

This Court did say that the petition of *Central States* had set forth that its rates were insufficient to produce a fair return (324 U. S. 142) and had complained because the court below had “disclaimed jurisdiction to determine the reasonableness of the local rates.” (324 U. S. 142.) We do not understand, however, that this Court made any finding that the rates below were too low—or that the decision of the majority turned upon that point. The dissenting opinions, on the other hand, followed the Commission’s theory—urged in that case as well as this—that the adequacy of the rates was irrelevant or should be assumed.

The majority opinion held broadly that such a by-passing of the rights of those who paid the money into the fund was not within the power of a court of equity.

In any event, the factual basis for the alleged distinction does not exist.

Although the Commission has throughout its brief made the flat statement that the return to Memphis Natural has been adequate, we have shown above that there is no basis for such a statement; that the Commission has never made any such finding after a hearing conducted as required by the Natural Gas Act; and that inferences to be drawn from the facts shown to the Court are not to the effect that the return of Memphis Natural during the impounding period was excessive, but rather that it did not receive a fair rate of return. (See discussion at page 33 *et seq.*)

In truth, neither in the *Central States* case nor in this case was it established that the intermediate companies earned in excess of a fair rate of return during the impound-

ing period, so that in each case the underlying basis upon which the payment of the impounded funds to the ultimate consumers could be predicated, is missing.

### **3. Alleged statement of Memphis Natural about passing on.**

The Commission's brief (p. 57) makes a passing reference to a sentence in an opinion filed by the Commission some time after the Memphis Natural rate reduction in 1943—that representatives of the Company had stated that any future benefit the Company might receive by reason of the Interstate order would be passed on to its customers. It is not clear just what inference the Commission expects the Court to draw from this vague statement.

The new rate schedule filed by Memphis Natural was authorized by the Commission to be effective July 26, 1943. On August 31, 1943, the Commission entered a formal order approving the new rate schedules effective as of July 26, 1943 (R. 31). On September 21, 1943, the Commission filed an opinion—approximately two months after the conferences between Memphis Natural and the Commission's staff had been concluded—which contained the general, vague, unilateral statement referred to above.

It is, of course, possible that during the discussions—which lasted over several months—some representative of Memphis Natural may have said that if the Interstate rate reduction resulted in Memphis Natural's earnings in excess of the allowable return, some rate reduction would be in order. However, the disappointing fact is that the rate schedule promulgated in 1943 for Memphis Natural did not produce the allowable return. As we have shown above, Memphis Natural is prepared to prove this if the point becomes material.

The Commission's brief makes no claim that this statement was a definite agreement. It could not have been regarded as such by the Commission or the language in the Commission's opinion would have been more explicit. If any such actual agreement had been intended, surely it would have been reduced to writing and incorporated in the record in some formal way.

The agreements which were reached between the parties were reduced to writing, and there is no such record of any written agreement of this nature. The Commission does not contend that there was one. Indeed, it would have been inconceivable that any responsible officer of the Company would have been willing to make any such unqualified agreement binding on his Company in the face of the rapidly changing war conditions which then existed.

The courts will presume that intelligent men will incorporate into their contracts all matters about which they have agreed, and that the agreement embraces the entire understanding. That rule is elementary law and has been stated at one time or another by courts everywhere. As this Court said in *Bast v. First National Bank*, 101 U. S. 93:

"No principle of evidence is better settled at the common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' 1 Greenl., Ev., sec. 275."

The Court quoted with approval:

"Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds."



Indeed, if it were necessary, we should contend that it would be against public policy for any utility to enter into any such vague, unqualified agreement, unlimited as to time, without regard to conditions which might exist thereafter. It might well be that such an agreement would disable it from adequately and properly performing its public duties.

Even if the existence of some agreement were admitted, it could not operate to require Memphis to pass on the impounded moneys. Such an agreement would not be a part of the Memphis rate structure. It is not included either in the schedule of rates itself or in the order of the Commission approving such rates. Rates are established by filing the rate schedule with the Commission or by an order of the Commission—not by a side agreement of the natural gas company with the Commission. The Natural Gas Act makes no provision for rate regulation by agreement not reflected in the filed rates.

If the Commission had entered an order requiring Memphis Natural to give effect in its rate schedules to such reduction in the cost of gas as might result from the order in the Interstate case, that would have been a matter which Memphis Natural could have appealed from, or could have sought to have modified at any subsequent time, as soon as it had been demonstrated by actual experience—as a result of what actually happened—that its rates were unremunerative. But no such order was entered—and the understandings that were executed contain no reference to any such agreement.

**4. The difference between the terms of the impounding orders in the *Central States* case and in the present case is immaterial.**

The argument at page 61 of the Commission's brief that the difference in the form of the stay orders in the *Central*



*States* case justifies a different decision in this case is too tenuous for serious consideration.

The issue in the *Central States* case did not turn on a question of form.

It is true that in the present case the stay order provided (R. 2) that the funds should be returned to

“ \* \* \* such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act.”

The court further reserved power to modify the order to protect the rights and interests

“ \* \* \* of the ultimate consumers or other parties financially interested in the impounded funds.”

This was a natural form of stay order in view of the decision of the Circuit Court of Appeals in the case of *Natural Gas Pipe Line Company v. Federal Power Commission*, 134 F. 2d 263 (C. C. A. 7th 1942), which was then outstanding and had not yet been reversed in principle as it later was by the Supreme Court in the *Central States* case, 324 U. S. 138.

It should be noted, however, that there is nothing in the terms of the stay order which constitutes an adjudication of any kind as to who is entitled to the fund. It merely gives notice that the court will distribute the fund to whoever may be entitled to it—whether “ultimate consumers of gas or other persons.” But the form of the order does not in any way determine the power of the court or the rights of the parties.

Memphis Natural is one of the “other persons” referred to in the order. The court below has so found and decided

accordingly. The court had no intention of distributing the fund to consumers unless they were shown to be legally entitled to receive it. It has found that the consumers are not entitled to receive it and nothing in its order prevented it from returning to Memphis Natural the part which Memphis Natural paid in.

Neither did the decision of this Court in the *Central States* case turn upon the form of the bond in that case. If it had, all the discussion of general principles would have been unnecessary.

### Conclusion.

The Commission is asking this Court to overrule its opinion in the *Central States* case, 324 U. S. 138, rendered less than four years ago.

It is asking the Court not only to proceed outside the framework of the Natural Gas Act—but also to exercise the legislative power of making rates and to substitute its own action for the action of the proper administrative authorities, state and federal.

It is asking all these things in the name of expediency and convenience.

We submit that the decision in the *Central States* case was not a "sport in the law" and that it was not "inconsistent with what preceded and what followed it." It should be reaffirmed.

As said by this Court in *Screws v. United States*, 325 U. S. 91, 112-13:

"But beyond that is the problem of *stare decisis*. The construction given §20 in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule

adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 64 S. Ct. 455; 88 L. Ed. 561, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of §20 to meet the exigencies of each case coming before us."

Respectfully submitted,

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January 4, 1949.



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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

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No. 109.

Federal Power Commission et al.

vs.

Interstate Natural Gas Company, Incorporated, et al.

No. 188.

Public Service Commission of the State of Missouri

vs.

Interstate Natural Gas Company, Incorporated, et al.

No. 209.

Memphis Light, Gas and Water Division

vs.

Interstate Natural Gas Company, Incorporated, et al.

No. 212.

Illinois Commerce Commission

vs.

Interstate Natural Gas Company, Incorporated, et al.

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On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit.

**BRIEF FOR SOUTHERN NATURAL GAS  
COMPANY, RESPONDENT.**

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3 January, 1949.





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VI. The proposal of Petitioner that the Court submit the question of fair return to Southern Natural for the period 1943-1947 for advisory opinion by the Federal Power Commission or State Commissions is untenable, for lack of authority in such agencies and because of the total inaptness of the proposal to graft that mechanism on the courts of appeal. . . . . 37

VII. The contention by Petitioner for distribution of the stay fund to ultimate consumers by-passes the downstream distributors and municipalities which purchase gas from Southern Natural and is based upon a wholly unwarranted assumption that these distributors would have been compelled to pass the full reduction on to consumers, if it had been compulsorily made available by Southern Natural to the Distributors . . . . . 39

VIII. The average overcharge proposed to be allocated from the fund to commercial and domestic consumers in Southern Natural's area amounts to \$2 per customer for the entire 4½ years or at the average rate of 47¢ a year per customer. That result is inadequate to warrant consideration being given to the overruling of established precedents and the imposition on the courts of appeal of the rigid rule sought by Petitioner. No distributor, State authority or consumer in Southern Natural's area has responded to Petitioner's invitation to participate in this proceeding for any such minimal result. . . . . 41

IX. The mechanical and administrative functions involved in the insistence of Petitioner are inconsistent with the jurisdiction and unsuited to the organization and functions of the courts of appeal. The history of refunds in similar cases made pursuant to consent demonstrates the lack of judicial standards, the complexity and the burden upon the organization and functions of the Court which would result from the adoption of the rule proposed by Petitioner . . . . . 42

X. The functions proposed by Petitioner are those of rate making in violation of the basis of and un-deviating adherence to the doctrine of primary jurisdiction . . . . . 46

XI. Inasmuch as the right of Southern Natural to restitution from Interstate is incontestable for the lack of any offsetting equity as between Interstate and Petitioner, the proposal of Petitioner for distribution to ultimate consumers having a molecular interest in the fund would expose Interstate to a heavy penalty of which it was not adequately apprised by the terms of the stay order. . . . . 47

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

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No. 109.

Federal Power Commission et al.

vs.

Interstate Natural Gas Company, Incorporated, et al.

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No. 188.

Public Service Commission of the State of Missouri

vs.

Interstate Natural Gas Company, Incorporated, et al.

---

No. 209.

Memphis Light, Gas and Water Division

vs.

Interstate Natural Gas Company, Incorporated, et al.

---

No. 212.

Illinois Commerce Commission

vs.

Interstate Natural Gas Company, Incorporated, et al.

---

On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit.

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**BRIEF FOR SOUTHERN NATURAL GAS  
COMPANY, RESPONDENT.**

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**OPINION BELOW.**

The opinion of the Court of Appeals for the Fifth Circuit was filed March 12, 1948 (R. 103), and is reported in 166 F. (2d) 796.

## JURISDICTION.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-112). Petitions for writs of certiorari in Nos. 109, 188, 209, and 121 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

## STATEMENT AND SUMMARY OF ARGUMENT FOR SOUTHERN NATURAL GAS COMPANY.

This statement and summary of the argument are set forth under the same section of this brief for the purpose of more clearly supplementing the facts appearing in petitioner's brief, in their relation to the argument and more clearly emphasizing what are deemed to be the inadvertencies or inaccuracies in the statement and contention of petitioner, Federal Power Commission, in No. 109.

The statement for petitioner, as far as it goes, is accurate as to the main procedural steps, but is inaccurate or inadvertent throughout the brief with respect to the bearing of *Central States Co. v. City of Muscatine*, 324 U. S. 134, both as to the intervention of this respondent and the so-called compulsion of the *Central States Case* on the Court below.

The intervention of Southern Natural Gas Company (Southern Natural) was not, contrary to the assertion of petitioner, either in terms or in fact in reliance on or dependent upon the *Central States case*, although in the argument on submission that case was recognized as an appropriate decision for citation as the latest of an established line of authorities sustaining the intervention and the distribution of the fund to the sole parties in privity to the overcharge, who alone paid it under compulsion of the stay order.

Southern Natural's intervention asserted its vested right, independent of the terms of any stay order or any bond taken in the review proceedings, to have restitution from Interstate for illegal overcharges exacted, and expressly disclaimed any limitation of its claim to the terms of the stay order (Intervention, Sec. 6, R. 52), viz.:

"6. Section 19 (c) of the Natural Gas Act conferred or recognized jurisdiction in this Court to stay enforcement of the Commission's order when Interstate instituted review proceedings in this Court, but no provision of said Natural Gas Act or general power of this Court authorized suspension or impairment of Southern's vested right to refund from Interstate, except as might result from a decree herein modifying or setting aside the Order. The Order has been affirmed in all respects.

"The Order of June 14, 1943, staying enforcement on the conditions stated was entered ex parte and without notice as to Southern. Southern was not a party to the proceedings before the Commission or on review by this Court and Southern should not, as it is advised, by reason of conditions imposed upon Interstate for the stay be held to have waived or transferred its right to final settlement with Interstate on the basis averred herein, that is, by recovery from Interstate in Southern's own sole right to the sum of \$688,156.71, with interest from the dates of the respective excess payments."

That intervention (Sec. 7, R. 52) further stated that Interstate has filed its petition (R. 16) for disposition of the fund, requesting and consenting that distribution be made to the pipeline purchasers from Interstate; and Southern Natural taking cognizance both of notice of that motion and in response to the accepted discretionary practice of courts of equity to accept intervention in such matters

intervened in the court below for recovery from Interstate of the overcharge, the right to which was vested in Southern Natural by law, with or without respect to any bond or fund. *Public Serv. Com. v. Brashear Lines*, 312 U. S. 621, at p. 629.

As to the fund, the Court was, of course, under a self-imposed duty to make distribution in conformity with "controlling legal principles." *U. S. v. Morgan*, 307 U. S. 183, 197.

Without respect to the fund, "what has been given or paid under the compulsion of a judgment, the Court will restore when its judgment has been set aside." *U. S. v. Morgan*, *supra*.

By its intervention, Sec. 7, Southern Natural expressly asserts that it invited distribution from the fund only as payment *pro tanto* on Interstate's independent liability for the overcharge unlawfully exacted from Southern Natural.

7. By its petition filed herein, verified under date December 16, 1947, Interstate has requested and consented that distribution of the funds remaining deposited in the registry of this Court as a condition to obtaining stay of the Commission's Order be made to Southern and other named pipe line purchasers from Interstate. Southern is, accordingly, entitled to and is willing to accept in its own right such distribution as payment *pro tanto* on the amount due it from Interstate provided the amount be paid to Southern without commitment or prejudice (R. 52).

The contention of Southern Natural was and is that when the stay was dissolved the suspended rates "were then in effect as though the injunction bond had never been granted." *Inland Steel Co. v. U. S.*, 306 U. S. 452.

Certiorari was granted in response to the representation by petitioner that the order for distribution was compelled by the decision in the Central States Case, and in response to the express or implied representation that the Central States case declared a novel or original rule and that the rule was wrong. This respondent considers that the asserted position was inadvertent, that there was no compulsion on the Court below by reason of the Central States decision and that the determination by the Court of Appeals that the fund, under its equitable control, should be paid over to the pipelines, without prejudice to remote rights, presents no basis for reversal.

Petitioner sought and obtained the writ to present the narrow question whether *Central States Electric Company v. City of Muscatine*, 324 U. S. 134, is wrong and should be overruled; and, if not, whether that decision compelled the court below to order distribution of the stay fund to those who, alone, were in privity with the rate and to the illegal overcharge and paid it under compulsion.

The brief for petitioner takes a much wider scope.

To summarize, petitioner in its statement and argument, takes the following main positions, which are considered either unsound or unwarranted on the facts. They will be dealt with in this order under a similar numeration in the argument for Southern Natural.

I. Petitioner ignores Southern Natural's vested cause of action for restitution, independently of the terms of any stay order.

II. Petitioner undertakes to relegate Southern Natural to the sole status of an applicant for distribution from a fund subject to the equitable discretion of the Court on an abstract or non-justiciable basis in competition with the ultimate consumer or general public rather than as a con-

templated claimant to a fund set up as security for those who might, as made plain by Sec. 4 of the order, show a justiciable financial interest in the result of the overcharge exacted under protection of the stay order. Petitioner attaches unwarranted significance to the mention of ultimate consumers in the initial order in spite of Sec. 4 (R. 2) and the obligation of the court to follow tangible equities and stop short of distribution to third parties having no remote justiciable relation to the fund.

III. Petitioner undertakes to graft both on the fund and on the vested right of Southern Natural arising out of the Natural Gas Act the conditions, imposed on the right to recover taxes illegally collected under AAA, which were adopted by Congress and discussed in *U. S. v. Jefferson Electric Co.*, 291 U. S. 386, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, viz.: the burden of showing that claimant had not included the AAA tax in the price for the commodities sold or had not otherwise shifted the burden of the tax.

IV. Petitioner undertakes to have this Court on this record hold that it must be assumed that Southern Natural, by reason of sundry administrative or voluntary adjustments of its wholesale rate schedules, made during the period 1943-1947, is estopped from contending that in a "fair return" hearing Southern Natural could have retained any part whatever of the overcharge paid to Interstate. In short, that its net income from its regulated business during that period must be conclusively presumed to have been not only the maximum for which it could have asserted constitutional protection, but that any further return would also have been excluded from the zone of reasonableness above confiscation supposed to be inherent in the administration of the system for the regulation of rates. That zone above confiscation is deemed essential not only to practical administration of rate regulation, but



to judicial review and to the survival of any system under private ownership essential to the public welfare and dependent for continual expansion on investment by the public.

The overcharges paid into the fund allocated to Southern Natural's purchase from Interstate and resold to distributors over four and a quarter years (\$473,521—R. 30) amounts to a fractional percent of Southern Natural's annual operating expenses deductible in determining its net operating income. The petitioner conducted a more or less desultory hearing, interspersed with voluntary changes (domestic use reductions and industrial increases), for nearly three years (Pet. Br., pp. 53-54). This informal procedure was carried on with desirable cooperation, including cooperation between Southern Natural and its vendee distributors and understandings with the Commission, in a genuine and liberal effort to protect all interests and simplify one of the most difficult administrative problems in the American constitutional system, without controversy. For the Commission now to insist that the result must be conclusively presumed to be exact to a fractional percent and to allow for no zone of reasonableness is not only on its face untenable, but does a disservice to the administration of the system and the cooperation the Commission has received in these matters from many pipe line companies, including Southern Natural.

V. Petitioner undertakes to have this Court and the Court below ignore the fact that approximately twenty (20) percent of Southern Natural's sales (R. 30) exclude any possible inquiry into the price or return, since they were direct sales to industry consumers at rates fixed by contract not subject to regulation under the Natural Gas Act or by any state authority, being made to selected private industries under private contracts as to location, interruptibility, take cognizance of highly competitive conditions,

large volume, summer consumption and other factors resulting in extremely low rates, as to which Southern Natural had not assumed or undertaken utility status and as to which Southern Natural's return reflected in any refund from Interstate was and is wholly removed from any concern or authority of any Commission (R. 50):

"Southern has not assumed utility status nor been held to be a public utility or common carrier under the laws of any state. Its deliveries in interstate commerce to distributors since April 27, 1943, the date of the order hereinafter mentioned, have been at rates directed or approved by the Federal Power Commission, as hereinafter stated. Or otherwise lawfully filed and effective under the Natural Gas Act. Its direct deliveries to consumers, whether interstate or intrastate, have not at any time been subject to the jurisdiction or control of that Commission and have been made under said private contracts and at rates fixed by such contracts over which no public or regulatory authority has claimed or asserted jurisdiction in so far as Southern is concerned. \* \* \* no public or regulatory authority has in fact, up to this time, had jurisdiction or authority to revise such private contract rates either prospectively or retroactively or otherwise to require refunds thereof to be made by Southern to any person."

VI. Petitioner undertakes to have the question of "fair return" for the long past period 1943-1947 now submitted for an advisory opinion by regulatory agencies, a function which was and is alike presently beyond the jurisdiction of Federal Power Commission or any regulatory agency in Southern Natural's area, so far as the stay period is concerned.

Petitioner naively suggests that the Federal Power Commission and the Illinois Commerce Commission

have offered to lend their services to investigate the claims of Interstate's vendees who paid the overcharge (p. 33, footnote). The Federal Power Commission has no jurisdiction for any such academic purpose. If it asserted its jurisdiction not in a *bona fide* or requisite proceeding to determine a fair rate structure in 1949 for future application, but for the ulterior and improper purpose indicated, the action would not only constitute an abuse of function but no such finding in 1949 or 1950 could be related, except by the most arbitrary action, to conditions during the stay period.

In *U. S. v. Morgan*, 307 U. S. 183, relied on by petitioner, the Court found that a proceeding was *currently* pending before the Secretary for the necessary determination of a schedule to replace a schedule illegally declared. That was a proper and not a distorted purpose, which petitioner is asking this Court to sanction.

No commission in any state in Southern Natural's area of distribution has any retroactive functions or any jurisdiction to hold admonitory hearings relating to long past periods, even with respect to pipe lines which have assumed utility status. As shown above, no state commission has asserted any jurisdiction whatever over any phase of the rates of Southern Natural and none could be conceivably induced to undertake the function on which the petitioner predicates its argument that the Court of Appeals should have suspended distribution until admonished by unauthorized hearings by State Commissions.

VII. In its insistence on consumer distribution, petitioner undertakes to ignore the rights, prior to any of ultimate consumers, of distributing companies, subject to state regulation, and municipalities, which purchased gas from Southern Natural on its way down stream. Whatever price for gas for resale was paid to Southern Natural was paid

by these distributors. If Southern Natural and other vendees of Interstate had passed on the burden of the overcharge, they passed it on to the distributing companies, and whether the latter would have had a constitutional right to keep it is a question which would involve an retroactive and academic rate or fair return hearings for the period June 15, 1943, to September 30, 1947, in the case of Southern Natural alone; and a dozen more in the case of the others; in short, some nineteen futile hearings. In Southern Natural's area no regulatory authority has retroactive jurisdiction.

If, notwithstanding *Southern Pacific Co. v. Darnell-Taezner Lumber Co.*, the *Morgan Case*, the *Inland Steel Case* and the *Central States Case*, *infra*, or for any reason the immediate vendees of Interstate were held, after synthetic fair return hearings covering the stay period, to be disqualified from receiving refund of the overcharge, through the fund, it is obvious that the distributors would claim it, precisely as the Memphis Light Gas and Water Division (an unregulated municipal distributor) is claiming it here. No distributor in Southern Natural's area of transmission has waived or indicated any intent to waive any right it might have to the fund. The petitioner seeks to disqualify them with the statement that if they had not during that entire period exhausted their right to demand the full limit of a constitutional return, that is their bad luck. They must be conclusively presumed to have done so. That attitude appears inconsistent with the doctrine of comity and cooperation in a difficult problem, with the impossibility of exactitude, in rate regulation, and with the saving principle of the zone of reasonableness inherent in any workable administration or judicial review of the system.

VIII. According to the table supplied and cited by petitioner (R. 30) the gas sales by Interstate to Southern

Natural which ultimately reached consumers through the nine distributing companies or municipalities resulted in total overcharges of \$473,521. This gas was in 1947 (a representative year) distributed to 213,637 residential and 22,175 commercial customers, or a total of 235,812. The average overcharge allocated to this load was, accordingly, \$2.00 per customer for the entire four and a quarter years, or at the average rate of 47 cents a year per customer.

This computation gives an undue average to the domestic or non-commercial consumer since a major proportion of this fancied burden would obviously be allocable to the greater average commercial load, which, equally as obviously, would have passed on the negligible overcharge to the general public in prices or, substantially, as a tax deduction, to the Federal Government. That ultimate destination will be a principal beneficiary of the refund to the pipelines ordered in this case.

Computed, however, on a full average basis of 47 cents a year, it would appear that the ultimate consumer would not be paying too great a price for the benefits of a system of constitutional regulation, which can not be both constitutional and instantaneous. Nor does it appear that the total amount of \$2.00 per customer is sufficient to warrant the over emphasis with which the Commission insists on overruling established procedure. Not merely overruling it but implementing the change by forcing on the Courts of Appeals a fixed rule for "fair return" hearings; academic and retroactive in character, essentially beyond their own organization and jurisdiction, in the futile effort to determine where the final incidence of an overcharge has come to rest in the well to market process.

It should be noted, as a fact, (a) that in this proceeding no state commission and no municipal or utility distributor which purchased its supply from Southern Natural,



nor any industry customer, responded to petitioner's broadcast to join in the effort to divert this marginal revenue from Southern Natural and (b) that Southern Natural has expended for extensions of plant and capacity, the approximate sums indicated in the margin, a result which could not have been accomplished if its zone of return were restricted to a fractional percent above confiscation.\*

The stay order of June 15, 1943 (R. 1) was *ex parte* as to Southern Natural. Neither the Federal Power Commission nor any industry or distributor purchaser, downstream; from Southern Natural nor any representative of ultimate consumers or municipality, sought to commit Southern Natural to the waiver in their favor of its right to collect and retain the overcharge by plenary action or to reduce Southern Natural's vested right to the overcharge to the status of a competitive claimant to the fund. Nor did the order purport to relieve Interstate of its primary obligation (temporarily suspended) to account directly to Southern Natural and other pipeline purchasers for the overcharges paid by them, on termination of the stay.

IX. Whether these hearings (to determine whether refund to the pipeline which paid the overcharge would be a wind-fall which the pipeline could not have retained as within the zone of reasonableness) should be held by the Courts themselves or would be admonitory hearings by State or Federal authorities in judicial extension of their bona fide functions, the result or combination would be equally unsuited to the functions and procedure of the Courts of Appeal.

The history of "ultimate consumer" distributions by consent and of the "abstract equity" determinations as to

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\* Net property additions: 1945, \$2,400,000; 1946, \$4,500,000; 1947, \$6,100,000; 1948, \$17,000,000.



who are eligible in the consent distributions demonstrate that the procedure is unsuited to the functions and organization of the Courts of Appeal, do not justify the reversal of established, orderly precedents and should not be forced on the Courts of Appeal to serve a result which is both of doubtful merit because of inherent speculation as to the final incidence and in all such proceedings to date has proven a matter that is indisputably *de minimis* as to domestic consumers to whom, petitioner insists, the distribution should be inflexibly required.

X. Since the right of Southern Natural to restitution on its vested claim against Interstate is indisputable, without reference to the fund, then if petitioner were sustained as showing that the ultimate consumer has an equitable priority over the pipelines and intermediate distributors not before the Court, *as to the fund*, the question then before the Court of Appeals would be the apparently pressing equity of Interstate to protection against use of the fund to create a double exposure for approximately \$2,500,000 and costs of distribution as opposed to the remote equity of the ultimate consumers to a total distribution averaging \$2.00 each.

## ARGUMENT.

### The Central States Case Neither Originated Nor Compelled the Application of Any Rule Which Should Be Re- viewed or Modified.

Petitioner's argument is that a new ruling should be laid down by this Court that stay funds required in the case of stay orders granted to originating or up stream pipe lines must, but for extraordinary or unstated circumstances not indicated in the argument, be hereafter impounded for and distributed to ultimate consumers no matter how far removed from privity to the overcharge.

The theory is that distributors and upstream intermediate pipe lines must be conclusively presumed to have received at least the bare return which they could protect against confiscation, either as a result of Commission's orders (State or Federal) or because of a conclusive presumption that they would otherwise have set in pursuit of an increase through the Commissions and the Courts. Petitioner is the last authority which should under our system advance any such contention. Without comity and reasonable consideration and adjustments as between pipelines and distributors and practical compromises by both with or approved by regulatory agencies through informal adjustments stopping short of full or controversial hearings, systems of regulation would be, in the long run, inoperable. Probably ninety percent of the functions of the Commissions are discharged in that manner. The history of all rate controversies and of the natural gas fund controversies in particular demonstrate the cost, lost motion and burden on the judicial process which the Commission's theory of exactitude and rigidity would invite.

The Central States case is not subject to attack, either as an original rule or as a conventional precedent, to

make way for any such rigid, distorted and unrealistic formula as counsel for the petitioner contend.

The Court of Appeals was not deviated from any preferred course by compulsion of the Central States case; nor was it an indispensable citation for that court's discretionary distribution of the fund in a manner that satisfied *pro tanto* the overcharge liability of Interstate to the only parties legally entitled to collect it.

Any other distribution would have exposed Interstate to double liability. Distribution to those down stream would have involved a judicial consideration of the position of intermediate downstream pipelines and ultimate distributors, before indulging the presumption that they also had realized more than they could have protected from confiscation.

The annual and total amount distributable on an ultimate consumer basis was so nominal as to be within the rule of *de minimis*—certainly not substantial enough to the several consumers to warrant exposing Interstate to the liability or, rather, the certainty of having to pay double the amount of the overcharge, plus the large cost of distribution of the fund contemplated by the order (R. 2).

This *casus* presented an unmistakable occasion for the exercise of equitable discretion by the Court of Appeals with which, it is submitted, this court should not interfere. That discretion did not arise out of the Central States case. It was fully recognized as far back as *Russell v. Farley*, 105 U. S. 433, 444, where it was conceded that in the exercise of its discretion over a court created fund the court could modify its terms or return it to the party who paid it.

In requiring the fund the Court entered into no contract or understanding, *U. S. v. Morgan, supra*, as petitioner

urges, merely because "ultimate consumers" were mentioned in the first section; and almost certainly excluded by section 4, which plainly contemplated distribution to claimants having a justiciable financial interest, rather than those who might show up with 700,000 remote and speculative claims, two or three times removed from privacy to the overcharge, aggregating an average amount doubtfully sufficient to cover the cost of distribution.

As stated in *U. S. v. Morgan, supra*, in acting to dispose of a fund created in response to the court's order "it must conform to controlling legal principles"; that is, the discretion must be tangible and substantial.

That is all that was done by the Court of Appeals. Its conclusion was not forced by the Central States case. That case is no more apt as a citation than *Inland Steel Co. v. U. S.*, 306 U. S. 153, or *U. S. v. Morgan*, 307 U. S. 183.

**The Extreme Ultimate Consumer Consequences Which  
Petitioner Seeks to Attach to Its Rate Orders Is Not  
Warranted Under the Natural Gas Act and Is Not  
Sustained BY THE DECISIONS.**

Throughout its brief, petitioner asserts that the objective of the Natural Gas Act was protection of the ultimate consumer. It is to be doubted if any system of regulation could be sustained which did not have as its objective the general public interest, but, as narrowly applied by petitioner to the ultimate consumer, the formula would be violative not only of the Natural Gas Act but of the Federal Constitution. As stated by the Court in the Central States case, at p. 144:

"The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to

the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this court's decision."

The rigid formula for which petitioner contends is unmistakably the extension of its jurisdiction and the consequence of its action beyond the Congressional intent, by impressing an impact and rigidity both of its affirmative action and (as here, by presumptions from its non-action) its inaction upon relationships beyond its jurisdiction.

This Court has recognized that no such result is appropriate. See *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591:

"As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions" (p. 612).

"We hardly can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate making powers of the Commission" (616).

And with respect to the Commission's findings as to past rates, held not reviewable because of no injury and dependent on action by State Commissions:

"The outcome of those proceedings may turn on factors other than these findings" (p. 619).

There is no substantial distinction between an order of the reviewing court, as a condition to a stay of a FPC rate



order requiring a fund for distribution to ultimate consumers having no privity or proximate relation to the rate and the order of the Court disapproved in *Central Kentucky Nat. Gas Co. v. R. B. Comm.*, 290 U. S. 264, which enjoined the state rates on condition that the gas company make effective a court made schedule, or the order disapproved in *Newton v. Consolidated Gas Co.*, 258 U. S. 165, which directed that the impounded fund be subject to distribution in accordance with a subsequently approved rate beyond the jurisdiction of the court to establish.

This Court has repeatedly warned the lower courts of the caution which should be exercised in prescribing conditions to the injunction of rates. Stone, J., in *Cent. Ky. Co. v. Comm.*; *supra*.

The conditions must not be a substitute for rate findings or rate making, beyond the function of the Court.

So far as this proceeding is concerned, the ultimate consumer, two or three times removed from privity with the only rate and rate function within the jurisdiction of the Federal Power Commission or the Court of Appeals, is indistinguishable legally and economically from the general public in the area.

In the absence of consent there is no more justification for an order of distribution to such ultimate consumers than there would be to an order of distribution to the general public, which, of course, would be a flagrant abuse of judicial discretion.

It may be that if Interstate had, in order to obtain a stay, agreed to a penalty fund for distribution, if the stay were dissolved, to charity or to the municipalities within the ultimate areas of distribution of its gas, it could not complain, but it would be difficult to imagine a more arbitrary exaction. The proposal of counsel for the Commis-



sion on this record is equally incapable of reconciliation with the rules for determining whether a stay should be granted or denied. If the public interest is so definitely threatened by the stay (on a basis not reduced, as here, to *de minimis*) the application for stay should be denied.

# I

## **Southern Natural Holds a Vested Right Independently of the Stay Order or the Fund to Recover From Interstate the Full Amount of the Overcharges Illegally Exacted, With Interest.**

The legal effect of the Natural Gas Act, as construed by approved analogy to the Interstate Commerce Act, is that the rates established pursuant to the Act are the lawful rates which must be applied in settlements for sales of gas subject to the Act; and that refunds of overcharges are payable to the purchaser or shipper who paid them, without respect to the question whether the purchaser or shipper has passed or can pass the final incidence of the overcharge, downstream, to successive pipe lines, distributors, wholesalers, ultimate consumers or the general public.

*Central States Electric Co. v. Muscatine*, 324 U. S. 138;

*Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, per Holmes, J., approving the Commission's comment on "the endlessness and futility of the effort to follow every transaction to its ultimate result" and holding that privity to a rate is essential to right of action for restitution, observing:

"Probably in the end, the public pays the damages in most cases of compensated torts."

P. 534.

*Adams v. Mills*, 286 U. S. 397, per Brandeis, J. —

"In contemplation of law the claim for damages arose at the time the extra charge was paid. . . . No useful end would be served by requiring the joining of 174,000 shippers in this proceeding."

Sec. 4 (a) of the Natural Gas Act (15 U. S. C., Sec. 717 [d]) makes unlawful the collection of any amount in excess of the rate ordered by the Federal Power Commission. Such overcharges are denounced as "illegal exactions."

*Federal Power Comm. v. Natural Gas Pipeline Co.*,  
315 U. S. 575, 598. —

Southern Natural has accordingly a vested and plenary right to recover the overcharge from Interstate, in its own right, independently of and not arising out of or limited by any bond or fund or *ex parte* order of the Court for stay purposes and wholly without respect to the question whether Southern Natural has or has not passed on the burden imposed by the stay, a right which may be asserted on intervention in the injunction proceeding.

*Arkadelphia Mill Co. v. St. Louis S. W. R. Co.*, 249  
U. S. 134;

Annotation, 131 A. L. R., p. 878.

Southern Natural's right to recover from Interstate remained plenary and independent regardless of the nature of the conditions imposed on Interstate for the stay or the class of persons, including Southern Natural, for whose security or benefit the conditions were imposed, primarily those having a financial interest in the fund (R. p. 2, sec. 4).

*Authorities, supra.*

To establish a common-law right to recover an overcharge, a showing of economic compulsion may be neces-

sary, but no such showing or condition is necessary to maintain an action for recovery of an overcharge declared illegal, as here, by statute. However, in this case Southern Natural Gas Company was under compulsion to take gas from Interstate at the excess rate in order to protect its supply contracts from termination, thus meeting the test of compulsion under common-law requirements.

18 L. R. A. (n. s.) 124.

The order of the Commission became not only the legal rate for settlement between Interstate and Southern Natural, but it became the final rate, not subject to reversal and reparation as excessive, unreasonable or extortionate as in the case of legally effective transportation rates subject to the Interstate Commerce Act which remain subject to reconsideration by the Interstate Commerce Commission.

No subsequent hearing or proceeding whatever (other than review by the Court of Appeals of the validity of the order of Federal Power Commission) could possibly displace the obligation of Interstate to settle with Southern Natural (not the Court) for gas purchased by Southern Natural, on the basis of the affirmed rate.

It is conceded that an action for restitution, whether maintained independently or entertained in the injunction proceeding responsible for the exaction of the overcharge, is in the nature of an action assumpsit or for money had and received in which traditional equities, as between the party who exacted and the privy who paid the overcharge, are considered. *Wilson Cypress Co. v. Atlantic R. R. Co.*, 109 Fed. (2d) 623; *U. S. v. Morgan*, *supra*; *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Greenwood County v. Duke Power Co.*, 147 Fed. (2d) 246.

In this matter, as between Interstate and Southern Natural, there is no conceivable equity which Interstate could

oppose to its liability for restitution, without respect to the *ex parte* conditions to which it agreed on obtaining the stay.

Interstate could, of course, obtain no credit from Southern Natural against the overcharge for having set up a security or secondary fund or obligation, except to the extent that Southern Natural might receive it.

Moreover, in this proceeding the request by Interstate (R. 16-19) for distribution of the fund to the pipeline companies which paid the overcharge acknowledges their right to distribution, upon which Interstate asked to be absolved from further liability with respect to the fund.

For these reasons, the basic right of Southern Natural to restitution from Interstate is acknowledged, final and incontestable, as between themselves, and without credit or off-set for any payment out of the fund unless and until Southern Natural shall receive it.

#### I-A.

**The Natural Gas Act Affirmatively and, as a Matter of Constitutional Necessity, Excludes Ultimate Consumers From Its Formula for Regulation and Confirms Its Mechanism Entirely to the Relation Between Pipelines and Utilities. Similarities and Distinctions Between the Natural Gas Act and the Interstate Commerce Act Are Organic and Informative.**

Comparison of the Natural Gas Act with the Interstate Commerce Act is useful. Shippers and consignees under the Commerce Act have direct rights under that Act and privity as to rates. They may sue in the courts for violation of the Commerce Act or proceed before the Commission to declare their right to restitution for overcharges or past excessive rates (Secs. 8 and 9).

Since admittedly the Federal Power Commission was given no jurisdiction to award reparation, the only recourse by a pipe line or utility connecting with an originating pipe line, for the exaction of an overcharge illegal under the Natural Gas Act, is by suit in the Courts. That right is limited to the parties to rates which the Power Commission has authority to regulate. No ultimate consumer has any right or standing whatever under the Natural Gas Act to reparations or by suit with respect to any rate the Power Commission may make, since the Federal Power Commission can make no rate whatever to which the ultimate consumer can possibly be a party. That Commission is separated from the consumer by the impassable barrier of local jurisdiction and authority. The Court, on review, can not by indirection or by the terms of a stay order avoid or evade this limitation.

So the fallacy in the statement that the Natural Gas Act was adopted for the benefit of the ultimate consumer is organic and jurisdictional. The contrast in that respect with the shipper-consignee relationship to rail rates under the Commerce Act is striking.

Congress conferred reparations functions on the Interstate Commerce Commission in order to simplify the procedure for redress for direct injuries from excessive rates which are usually small; and large numbers of shippers are frequently represented by shippers associations. *Sharfman, The Interstate Commerce Commission*, Vol. III, B, p. 333 et seq.

No such direct or individual function was intended or supposed to be required in the adoption of the Natural Gas Act, which was aimed at a "handful of holding or transportation companies" making deliveries to a necessarily limited number of local utilities. *Fed. Power Comm. v. Hope Nat. Gas Co.*, 320 U. S. at p. 610.

The proposal to expand any proceeding under the Natural Gas Act either before the Power Commission or on review before the Courts to reach ultimate consumers in vast numbers is an obvious distortion of the "gap-function" between the gas field and the local utility to fill which, alone, the Natural Gas Act was devised. *Hoppe case, supra.*

Notwithstanding the radically broader theory and the immediate shipper-consignee mechanism of the Commerce Act, the Interstate Commerce Commission never attempted to confuse the distinction between damage awards to those who had paid illegal overcharges and "relief for those who ultimately bear the burden of improper rates." *Sharfman, id.*, p. 339.

Prior to the adoption of the Hepburn Act conferring adequate future rate making power, reparation proceedings had been the unsatisfactory but only stimulus to fair charges. After the Hepburn Act "there was no longer any ground for looking upon the award of reparations *other than as a purely private redress*" *id.*, p. 340; and reparation awards were restricted rigorously to those who could demonstrate actionable and proximate damage, finally resulting in the decision, conclusive of this matter as well, in *So. Pac. Co. v. Darnell-Taenzer Lbr. Co.*, *supra*:

"the carrier ought not to be allowed to retain this illegal profit, and *the only one who can take it from him* is the one that alone was in relation with him, and from whom the carrier took the sum."

In its Annual Report, 1930, p. 91, the Commerce Commission said:

"Following the rule laid down by the Supreme Court in *Southern Pacific Co. v. Darnell-Taenzer Lumber Company* . . . we have declined to go beyond the



parties to the transportation contract in an effort to prove or disprove that the complainant was damaged."

And see full comment on the question as to whether the person who pays the rate ultimately bears its economic burden. *Sharfman, id.*, pp. 346 *et seq.*

In this proceeding, there is no confusion as to which of two parties to a freight shipment (consignor or consignee) should recover the illegal exaction. There is only one party; the pipe line. No ultimate consumer was a party to the rate suspended. By no sort of proceeding before the Federal Power Commission could the ultimate consumer insist that the effect of the rate be passed along.

The factors underlying the reduction of rates chargeable by pipelines (originating or intermediate) to distributing companies are only incidentally or remotely related to the ultimate consumer by the "new look" in rate making established in the Hope Case; and they are no more related to the ultimate consumer of the gas than they are to the general public.

## II.

**Southern Natural's Independent Right to Restitution of the Overcharges Illegally Exacted Under Protection of the Stay Order Is Not Limited to or by the Terms or Security Provided by That Order or to Any Discretion Held by the Court as to the Distribution of the Stay Fund.**

Petitioner is without basis for its effort to limit the vested right of Southern Natural for restitution of the overcharge to a claim merely against the fund or to force Southern Natural into a posture of controversy or competition with ultimate consumers or the general public for

equitable or abstract priority with respect to the fund. See Statement II, ante.

This follows necessarily from the disclaimer, noted above, by Interstate of any equity or claim in the fund or any defense or equity as against the right of Southern Natural to restitution of the overcharge by affirmatively requesting distribution to Southern Natural.

Petitioner confuses the purpose and function of the fund, created solely as a condition to the stay. The stay order was *ex parte* as to Southern Natural. The Court had no jurisdiction to subordinate Southern Natural's vested right to the rate suspended to a controversy with remote aspirants for participation in the fund. The Court of Appeals might, upon a satisfactory showing of indisputable solvency by Interstate, have required no fund and no bond, without thereby impairing Southern Natural's right to restitution. By established—if not universal practice—bonds and funds are required to secure prompt compensation or restitution to those whose vested remedies are suspended or who are otherwise justiciably and proximately damaged by the injunctive order.

It may well be that persons as to whom the inconvenience or damage of the injunction would otherwise be *damnum absque injuria* must look to the terms of the fund or bond, and to its control and administration by the Court where not otherwise given statutory effect, for limitations upon their rights to any recovery (*Greenwood County v. Duke Power Co.*, 147 Fed. [2d] 246); but that consequence is limited to those who complain merely of damages due to the stay order, who otherwise would have no cause of action arising out of the injunction, and not to those who, as here, have a vested, independent cause of action for the recovery of a fixed and obligatory amount with interest. That right survives intact and is fully, though belatedly, actionable on dismissal of the stay.

In imposing conditions for granting a stay the Court might appropriately require a bond to secure the payment of such actionable refund or damages as any party or any *privity to the rate* or even as any other person might proximately and justiciably sustain as a result of the stay; or might in lieu of bond require deposit in Court of the potential overcharge, for the same purpose.

We have stated the reasons for insisting that the Court could not by the terms for granting an injunction indirectly regulate the rates to be paid by ultimate consumers.

Without taking the position that no casus might arise in an injunction proceeding in which it would be proper to take bond or security purporting to create a cause of action in favor of third parties having no damage relation to an act enjoined, provable under our system, and having no right or privity as to any party or the act enjoined or its proximate consequences, we have found no authority for any such condition.

Certainly, the Court would have neither jurisdiction in ordering a stay under the Natural Gas Act nor equitable power to require by *ex parte* order that Southern Natural abandon or impair its right of action against Interstate and look solely to its claims under such bond or to such fund, even if the funds or bonds were adequate and for the sole benefit of Southern Natural.

Such bond or fund might or might not, according to the terms and basis on which it was ordered, constitute additional security protecting Southern Natural's plenary right of recovery against Interstate. It is established that a stay order which has improvidently omitted protection of those immediately damaged by the stay may and should be recast and that any stay fund should be distributed to those having a tangible rather than a wholly speculative equity.

Obviously no power would exist to compel Southern Natural to look solely to a fund created in part for the benefit of some person having no justiciable claim to refund, or to subject its plenary cause of action to the Court's view of the question whether Southern Natural or the ultimate consumer has the better social or moral or economic argument for reimbursement.

In *Brashear Freight Lines v. Comm.*, 41 Fed. Supp. 952, following remand from this Court for the ascertainment of damages resulting from the stay order, the Court declined to limit the state's right to accounting to the amount of the stay bonds which had been taken.

In view of the solvency of Interstate and its uninterrupted liability to Southern Natural for return of the overcharge, the damage or exposure to Southern Natural resulting proximately from the stay would ordinarily be costs of collection, as to which and as to which alone the discretionary administration of the stay fund would operate as a limit of Southern Natural's right to recover that nominal element of damage.

This does not mean that Southern Natural may not, appropriately, insist in this proceeding that the fund should stand and be administered for the prompt and immediate reimbursement of illegal overcharges exacted from it under the protection of the stay order, and should not be exhausted by creating an equity in favor of remote handlers or consumers of gas whose right to have received or retained any part of the reduction is necessarily speculative and cannot, in Southern Natural's area, be determined retroactively by the Court or any authority.

III.

**Petitioner Erroneously Maintains That in Order for Southern Natural to Qualify for Distribution From the Stay Fund It Must Meet the Burden of Proving That Southern Natural Has Not Passed on the Overcharge to Others, Precisely as if a Statute Had Been Enacted, Equivalent to the Provision to That Effect Adopted as a Condition to the Recovery of the AAA Taxes Declared Illegal.**

The position indicated above seems inferable from petitioner's reliance on *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, and *United States v. Jefferson Electric Co.*, 291 U. S. 386, 402-403 (Pet. Br. p. 20), by which petitioner seeks to distinguish or disqualify *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.* and *Adams v. Mills*, cited *supra* and relied on by Southern Natural. The only distinction between those groups pertinent to this matter is that in the tax reclaim cases Congress had affirmatively imposed on the claimant the burden of proving that the tax had not been specifically and effectively passed on.

In the tax refund cases it was deemed practicable for the claimant to earmark the transfer of the tax burden, by specific showing that *it had not been added to the price of the commodity*, or by an equivalent ascertainable certainty. The decisions are noteworthy here, for the Court held, directly or by necessary effect,

—that actions for tax refunds are in the nature of assumpsit (as in the case of other suits for restitution)

—that in that type of case the burden would not rest on a claimant to prove that he has not passed the burden on but for the adoption of the statutory burden of proof (291 U. S., at p. 396). That burden was recog-



nized as "an additional substantive element for recovery" (ib., pp. 397, 400), which must be averred and proven (p. 400).

The court said, in complete refutation of the position of petitioner with respect to the right of recovery, in that admittedly equitable form of action before the statutory provision requiring proof that the burden had not been shifted:

"If the tax was erroneous and illegal, as is alleged, it must be conceded that under the system then in force there accrued to the taxpayer a right to have it refunded *without any showing as to whether he bore the burden of the tax or shifted it to purchasers*" (291 U. S., at p. 401).

That is precisely the situation here and the case confirms the position of Southern Natural that its claim to restitution, whether by action against Interstate or by claim against the fund, is subject to no equitable defense as a result of the contention of petitioner that Southern Natural should now waive or lose its right to restitution in order not to be in the position of having shifted the illegal exaction and at the same time recovering a refund.

In like manner the other tax restitution case cited by petitioner directly sustains our position, viz.: *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. That case involved the statutory conditions prescribed for recovery of floor-stock taxes invalidated by *U. S. v. Butler*, 297 U. S. 1, to be found in the Revenue Act of June 22, 1936, 49 Stat. 1747, 7 U. S. C., sec. 644. That Act required that claimant show as a condition to recovery of the illegal tax paid by him that he had not shifted the burden of the tax, etc. The court recognized that *U. S. v. Jefferson Elec. Mfg. Co.*, *supra*, had decided the principle, viz., that the statute re-



quiring proof that the tax burden had not been shifted, there sustained, had substantively limited the right to a refund by adopting an added requirement as "an element of the right to a refund" (at p. 349). In short, that shifting the burden in its entirety would not, in an admittedly equitable proceeding, have defeated restitution from the Government itself but for the statute.

The Court also held that its approval of that added substantive statutory requirement was based on the assumption that proof of the facts as to shifting of the burden could be readily made, stating that, if that were not the case, the requirement would violate the Fifth Amendment:

"When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled" (at p. 352).

In this proceeding there is no such statutory requirement. If there were it is patently impracticable for petitioner, or for any ultimate consumer or for Southern Natural, to make proof in 1949 as to what part, if any, of Southern Natural's net revenue subject to regulation and allocable to the period 1943-1947 could or would have been constitutionally retained by it or would have been required on any rate hearing to be passed on downstream, or what part of any reduction passed on to distributors would have passed through them and reached the ultimate consumers.

Yet petitioner seeks to have that result assumed or synthetically and retrospectively determined by agencies having no jurisdiction to consider it at all. There we have both the impossibility of proof, which this court held to be suffi-

cient to invalidate a specific statutory requirement for a showing as to the shifting of the illegal exaction; added to the absence of any such requirement at all.

The contention of petitioner as to the fancied necessity for disclaiming a shifting of the burden takes on even less tributed to ultimate consumers of that gas the annual "windfall" to Southern Natural over the stay period, after taxes, would amount to less than one-fourth of one percent on Southern Natural's rate base, and that if the reduction on gas purchased by Southern Natural for resale were distributed to ultimate consumers of that gas the annual amount would be 47 cents per consumer per annum.

#### IV

**Petitioner Erroneously Maintains That There Is of Record or in the Proceedings Before Federal Power Commission Some Basis for an Assumption That Southern Natural Could Have Retained no Part of the Benefit of the Gross Rate Reduction Suspended by the Stay Order Had It Not Been Suspended or the Assumption That It Would Have Passed Through to Ultimate Consumers. The Presumption Would Be Contrary to the Public Interest in the Administration of the Natural Gas Act.**

There is no basis in this record or in the proceedings before the Federal Power Commission for petitioner's assumption that if the stay had not been granted Southern Natural could have retained no part of the increased gross earnings resulting from the rate reduction suspended by the stay order.

There is no lawful method by which the Federal Power Commission could now conduct an admonitory proceeding to advise the Court.

There is no state commission or authority in Southern Natural's area with jurisdiction to take such action with respect to the utility distributing companies.

The municipal distributors in Southern Natural's area are not subject to regulation unless by recent statute to which our attention has not been directed. *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236, S. C. 257 U. S. 66—and see 18 A. L. R. at p. 946. The absence of mechanism alone is, accordingly, conclusive against an admonitory inquiry either as to Southern Natural or the distributors. No situation similar to *U. S. v. Morgan*, 307 U. S. 183, exists here or can possibly be made available. Hence, the presumption must simply be strong-armed into a conclusion based on the matters largely *dehors* the record argued by petitioner.

It is not believed that any record or proceeding before the Federal Power Commission can be expanded to support a conclusion that a constitutional rate hearing related to the whole or any year of the stay period would have justified the conclusion that the amount of the reduction in the price of Interstate's gas would, unless passed on, have resulted in extortionate return or rates to Southern Natural. We assert that neither in the case of Southern Natural nor in the case of any other natural gas company has the Commission ever handed down or approved a general rate order with any such exactitude, even for rate making purposes, as is argued here on its behalf for a radically different purpose.

Excluding gas purchased for sale direct by Southern Natural to industry consumers and subject to no regulation, the rate reduction in question, less Federal income taxes deducted in accordance with the Commission's rate hearing formula, shows a potential saving to Southern Natural (if refunded) averaging \$97,531.00 a year, refer-

able to an average rate base (1944-1947) of \$38,808,000 or  $\frac{1}{4}$  of 1%. The argument of petitioner that this potential increase in return would have been constructively extortionate and damnifyingly inequitable is not only unwarranted as a matter of equitable determination but the use of such unattainable exactitude would make unworkable the administration of the Natural Gas Act or its judicial review.

The conferences, the voluntary initiation of rate reductions and adjustments, the demonstrated desire of Southern Natural and many pipelines to cooperate with the Commission in a difficult task which hairsplitting exactitude would make impossible, make it plain that the contention of petitioner here is not only irrational but is not in the public interest.

That contention, moreover, loses sight of the principle of the "zone of reasonableness" in the determination of rates which has made the system of regulation possible, without forcing the Commission to press aggressively for the line of confiscation or the industry to that of extortion. The implied contention of petitioner that an increment of  $\frac{1}{4}$  of 1% in the rate base return of Southern Natural would have been regarded as extortionate and outside of the zone of reasonableness is patently untenable.

In *Ashland Coal & Ice Co. v. United States* (1945), 61 Fed. Supp. 708, 713, Judge Dobie said: "The process of rate-making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities," quoting Mr. Justice Lamar's language in *I. C. C. v. Union Pacific R. R.* (1912), 222 U. S. 541, 550, that "there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer," and Mr. Justice Frankfurter's remark in *Board of Trade*

*v. United States* (1942), 314 U. S. 534, 546, that "the process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed."

If petitioner's contention were adopted in an effort to obtain a reparation order with respect to intrastate utility rates its extreme position would be met by the settled recognition of a zone of reasonableness in the maintenance of rates:

*U. S. v. Illinois Cent. R. R.* (1924), 263 U. S. 515, 522;

*Texas & Pacific Ry. Co. v. U. S.* (1933), 289 U. S. 627, 636;

*U. S. v. Chicago, M., St. P. & P. R. Co.* (1935), 294 U. S. 499, 506;

*Georgia v. Pennsylvania R. R. Co.* (1945), 324 U. S. 439, 460-461;

*New York v. United States* (1947), 331 U. S. 284, 344-345.

This Court has long held that the authority to award reparations is based upon the power to prevent *extortionate* rates or other *arbitrary* action:

*Lake Shore & M. St. Railway v. Smith* (1899), 173 U. S. 684, 698;

*Portland Ry. L. & P. Co. v. R. R. Comm.* (1913), 229 U. S. 397, 410.

The inaptness of the contention of exactitude and its relatively insignificant results to Southern Natural and *de minimis* bearing on the ultimate consumer in the great equation of the public service involved is further emphasized by the heavy and continuous investment which is indispensable to the public welfare.

Southern Natural's net rate base has increased during the last four years from \$36,671,000 to an estimated \$60,-

000,000 at the end of 1948, limited to that amount largely by scarcity of essential material.

That would not be possible on the policy of confiscatory exactitude and rat-holes alertness for legalistic return urged as obligatory, of all possible factors, by petitioner.

V.

**Petitioner's Contention That Southern Natural Earned Without Respect to the Rate Reduction During the Entire Period of the Stay the Maximum Amount Which Would Have Been Permitted in a Rate Hearing Is Not Only an Unwarranted Assumption in Gross (Supra), But Ignores the Fact That Southern Natural Sold a Large Volume of Gas to Industries for Consumption at Private Contract Rates Not Subject to Regulation or Control by Federal Power Commission or Any State Authority and Known Generally to Reflect a Low Margin of Return.**

The facts as to Southern Natural's private contract status as to its material sales of this gas direct to industry consumers are summarized in Par. V of the Statement and Summary *ante*).

There is, of course, no jurisdiction in the Federal Power Commission over these sales, which are in Southern Natural's area influenced or compelled by well recognized economic and competitive conditions. See *ante*. By taking a continuous volume during summer months, and by reason of their load factor, and due to the location of the principal consumers of this type literally on the coal measures in the Birmingham District, it is a matter of general knowledge that they take a low rate and even if the deliveries to industries were subject to regulation it is not conceivable that the contracts would have been disturbed during the stay period, with the OPA mine price of a repre-



representative steam coal in the Alabama field increasing 60% in the period January 1, 1943, to November, 1946, and the commodity and wage index of natural gas operation notoriously expanding. It is to be noted that in the consent distribution undertaken by the Court in the Natural Gas Pipeline Case, analyzed in the Appendix because of its typical illustration of the administrative complexity and arbitrary function in the process urged by petitioner as a fixed rule, the Court, in taking upon itself the determination of what groups among ultimate consumers were eligible for the distribution, excluded industrial and home-heating loads, as being commonly recognized to be sold at low rates, competitive with other fuel and carrying wide disparities in rates approved by regulatory commissions. *Natural Gas Pipeline Co. v. F. P. C.*, 131 Fed. (2) 157.

We find no evidence that petitioner gives any weight in its argument for a rigid "ultimate consumer" formula to the fact that this material industrial load is a matter of private contract, beyond the jurisdiction of the commission. The fund in court awaiting distribution reflects an amount equal to the overcharge on that load. Its distribution to "ultimate consumers" in the stream of regulation would be gratuitous and arbitrary.

## VI.

**The Proposal of Petitioner That the Court Submit the Question of Fair Return to Southern Natural for the Period 1943-1947 for Advisory Opinion by the Federal Power Commission or State Commissions Is Untenable, for Lack of Authority in Such Agencies and Because, of the Total Inaptness of the Proposal to Graft That Mechanism on the Courts of Appeal.**

No purchasers from Southern Natural, either industry or distributor, municipal or otherwise, intervened or ap-

peared in the Court below; nor did any State commission or municipal authority in Southern Natural's area, although circularized by petitioner.

No state authority in that area has indicated any intention or desire to engage in any admonitory hearing to advise the Court of Appeals, the objective of which is to declare Southern Natural's position synthetically inequitable and distribute 47 cents a year to ultimate consumers.

No state authority in that area has any jurisdiction to that end, known to counsel for Southern Natural, if it could be otherwise interested in that undertaking. The facts as to this matter and petitioner's offer to aid the Court (Br. p. 33) and the total lack of any similarity to the proceeding pending before the Secretary in *E. S. v. Morgan, supra*, have been noted in Par. VI, Statement and Summary, *ante*.

There are approximately twenty (20) distributing companies or agencies involved in the proposal to allot the fund to the ultimate consumer in addition to the pipeline purchasers, or some twenty-four (24) in all (R. 30). All of these are proposed to be subjected to retroactive fair return examination. The Memphis municipal authority alleges in its petition that it is not subject to regulatory control. That is true generally of municipal distributors, *Springfield Gas & Elec. Co. v. Springfield*, 292 Ill. 236, S. C., 257 U. S. 66, and see 18 A. L. R., at p. 946.

It may be that the Illinois Commission has jurisdiction to award reparation (*Illinois-Natural Gas Pipeline Case*, 141 Fed. [2d] at p. 30).

It is impossible to conceive of the grafting of any such multiple, unnecessary and unsanctioned mechanism upon the Courts of Appeal.

VII.

**The Contention by Petitioner for Distribution of the Stay Fund to Ultimate Consumers By Passes the Downstream Distributors and Municipalities Which Purchased Gas From Southern Natural and Is Based Upon a Wholly Unwarranted Assumption That These Distributors Would Have Been Compelled to Pass the Full Reduction on to Consumers, if It Had Been Compulsorily Made Available by Southern Natural to the Distributors.**

The facts as to non-concurrence by any known distributor in Southern Natural's area in the proposal of petitioner have been stated in paragraph VII of the Statement and Summary, *ante*. The assumption that the intermediate distributors should be by-passed is subject to precisely the argument opposing the by-passing of Southern Natural.

The sole basis of the argument of petitioner is the arbitrary assertion (Pet. Br., pp. 21-25) that "the ultimate consumers are equitably entitled to the fund." That argument is constructed upon a series of unsupported assumptions the more outlandish of which may be noted.

"The purchasers for resale of the natural gas . . . suffer no monetary loss as a result of the stay" (p. 22).

That statement, made in the face of Southern Natural's payment of \$682,000 in illegal exactions, is sought to be supported by a series of hypotheses such as the assertion that the purchasers may be presumed to have earned a fair return anyhow, *since they did not seek approval of rate increases*.

That assumption is unrealistic and, as we have pointed out, it is contrary to administrative cooperation and

comity. It ignores the delay and difficulties of a full dress rate proceeding. The timing of such a controversy is dependent upon many factors, including business forecasts and the extent to which earnings are considered to fall below a surviving return, as well as (in the case of Southern Natural) the earnings from non-regulated sales. The argument is, however, academic here. As to Southern Natural, the fallacy is the assumption that it has sustained no monetary loss if it earned a "fair return" in spite of the disbursement of money which it was under no legal obligation to expend and had a Fifth Amendment right to retain as against Interstate.

That notion of petitioners apparently rests upon the further assumption that a "fair return" is capable of translation into an exact sum of money, reflected in the *status quo*. Any earnings above that vicarious but absolute "fair return" are "an unmerited windfall" (p. 23). It might be thought "monetary loss", accordingly, must apparently be determined by some coincidental but exact "standard" which not only has never received legislative or judicial sanction but so far as counsel are advised has never before been suggested in the formula here urged by petitioner even in a Law Review.

It is a novel suggestion to be made to the Courts of Appeal that they delegate to Federal and State Commissions with respect to long past transactions the function of exercising the court's judicial discretion, accompanied by notice that the administrative agency proposes to ignore the zone of reasonableness principle and to apply the presumption of maximum return based on the pipelines cooperative hesitation to precipitate full dress rate litigations.

The statement of the brief (p. 24) that "the court, in staying the Commission order, prevented the transmission of these benefits to the ultimate consumers" indicates the

scope and purpose of the application for the writ, viz., not so much the correction of any inadvertence in the Central States case as to graft on the Courts of Appeal a rigid "ultimate consumer" formula based on untenable assumptions.

### VIII.

**The Average Overcharge Proposed to Be Allocated From the Fund to Commercial and Domestic Consumers in Southern Natural's Area Amounts to \$2 Per Customer for the Entire 4½ Years or at the Average Rate of 47c a Year Per Customer. That Result Is Inadequate to Warrant Consideration Being Given to the Overruling of Established Precedents and the Imposition on the Courts of Appeal of the Rigid Rule Sought by Petitioner. No Distributor, State Authority or Consumer in Southern Natural's Area Has Responded to Petitioner's Invitation to Participate in This Proceeding for Any Such Minimal Result.**

Par. VIII (Statement and Summary) states the facts as to the average distribution to ultimate consumers in Southern Natural's area contemplated by petitioner's formula, viz., approximately 47 cents a year, or a total of \$2.00. The total fund deposited in court through September, 1947, is asserted to be \$2,444,573, with some \$320,000 more not impounded (Pet. Br. p. 5). About \$1,000,000 of this potential total of \$2,764,573 is referable to direct sales to industries, presumptively under private contract over which no state commission appears, as yet, to have asserted or successfully established jurisdiction. The amount, accordingly, apparently available for distribution on the assumption of pipeline and distributor inequity and ultimate consumer equity is approximately \$1,764,573, which distributed to some 700,000 estimated meters in the total area would amount to a total of \$2.52 for the 4½ years, or about \$.59 a year.



If the pipelines and distributors were to be properly characterized as conclusively guilty of extortion or inordinate returns and had no Fifth Amendment right to restitution, whether they had shifted the burden of the overcharge or not, there is obviously no such extortionate windfall to them in terms of net percentage return on their rate base, to provoke the indignation indicated in petitioner's brief and no such theoretical loss or recompense to ultimate consumers to justify involving the Court of Appeals in the complications, hearings and lurches of petitioner's formula.

### IX.

**The Mechanical and Administrative Functions Involved in the Insistence of Petitioner Are Inconsistent With the Jurisdiction and Unsited to the Organization and Functions of the Courts of Appeal. The History of Refunds in Similar Cases Made Pursuant to Consent Demonstrates the Lack of Judicial Standards, the Complexity and the Burden Upon the Organization and Functions of the Court Which Would Result From the Adoption of the Rule Proposed by Petitioner.**

It is an axiom that where a court has inadvertently or otherwise given effect to a manifest and substantial injustice and it is within the court's power to redress the injury, mechanical difficulties and the saving of trouble would not justify the failure to make restitution. Here we have no such situation. The chance (and not any assurance whatever) of securing a rate reduction has been shown to be limited to a total average over  $4\frac{1}{4}$  years of approximately \$2.00—even less (net) to commercial users who saved taxes by the expenditure. The history of the consumer distributions, involving the long periods necessary to the initial and exploratory Natural Gas Act hearings and interpretations, shows that even in those protracted, precedent



making hearings, the amounts distributable to ultimate consumers have been *de minimis*.

It is the rule of the common law that damages from an injunction, where the suit is not maliciously instituted, are *damnum absque injuria*, resulting in the common and statutory practice of requiring bonds or funds. It would be futile to attempt to overcome the common-law rule, predicated on the confidence that the Courts will take full consideration of all private and public interests before granting a stay, by guaranteeing against even remote and consequential damages.

No one can question the *bona fide* purpose or the important questions involved in the Interstate proceeding or the absence of left-hand motives of which petitioner expressed apprehension or the absence of any molecular possibility of the abuse of the circumstance of affiliation.

That argument too closely parallels the untenable presumptions of exactitude and incitation to litigiousness underlying the argument for the presumption of extortion.

In view of the per capita results to the ultimate consumer it is fair to state that petitioner is not so much concerned over getting 47 cents a year to ultimate consumers in Southern Natural area as it is interested in preventing that respondent and the other pipelines from obtaining restitution in a lump sum of the overcharges which they paid.

The important, frequently or generally constitutional issues presented in these hearings sanctioned by Congress with full knowledge of their institution and progress should not be handicapped or blocked by inapt mechanism or unwarranted assumptions, on the assumption that the courts will not at the outset or by modification as the litigation proceeds take care that the public interest as well as that of parties is not unduly jeopardized.

*Greenwood County v. Duke Power Company*, 107 Fed. (2d) 484, affords a conclusive statement of these reasons why artificial rules of restitution should not be engrafted on the established procedure and rules of accountability, particularly in cases, such as here, involving the exercise for powers with respect to which the opinion of able and conscientious lawyers and judges is divided (Ib., at p. 488).

So much for the weakness of the general position of petitioner for an arbitrary "ultimate consumer" presumption and formula. When consideration is given to the mechanism proposed by petitioner to be grafted on the judicial process, the glaring inaptness of the suggestion becomes manifest. First, there is the proposal for admonitory hearings by all commissions, willing or unwilling, authorized or unauthorized, here involving petitioner and the commissions from some eight states. Second, and mainly, the mechanism for distributing trifling amounts to hundreds of thousands of ultimate consumers.

We set forth in the appendix a summary analysis of the distribution (by consent) to consumers in the Natural Gas Pipeline Refund by the Seventh Circuit and of the distribution as finally ordered in the case of the Panhandle Eastern Fund, a survey of which sufficiently indicates that the procedure followed, without prejudice to the rights of any person having a justiciable interest, in the Central States case was provident, followed traditional principles and should not be displaced by the rigid presumptions and anomalous complex, mechanism proposed by petitioner.

The Eighth Circuit in the matter of the Panhandle Eastern Fund (154 Fed. [2d] 909) directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with State law. Sub-

stantially the same procedure, was indicated by the Supreme Court in the *Central States case*, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635 (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere, with the distributors who received refunds, as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as in this litigation may be determined entitled thereto." See original stay order entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order, reflecting the extra-legal position of the Commission, improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle from distribution companies. Most of these distributors \* \* \* have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers." 154 Fed. (2d), at p. 910.

The order for distribution as actually entered by the 8th Circuit retreated from this broad suggestion and the comment quoted can not be regarded as a precedent (154 Fed. [2d] 910). Judge Riddick's dissenting view clearly prevailed in the final opinion for distribution.

**The Functions Proposed by Petitioner Are Those of Rate Making in Violation of the Basis of and Undeviating Adherence to the Doctrine of Primary Jurisdiction.**

It seems to us incontestable that petitioner is attempting to require the Court of Appeals to involve its process in an anomalous series of rate hearings. On page 26, although conceding that if the presumptions tendered by petitioner are not accepted, the reasonableness of the rates of the pipelines during the stay period became a factory for decision, petitioner argues that the Court should undertake the task as an "ancillary" function.

The argument ignores the intensely practical reasons underlying the doctrine of primary jurisdiction, as well as the necessary consequences of any scheme of rate regulation.

It adds nothing to the argument to characterize the reparation function here advocated as "judicial" in its nature. Mr. Justice Brandeis long ago disposed of that kind of argument:

"Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometime this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary

resort to the Commission is required alike in the two classes of cases. It is required, because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity, can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." *Great Northern Ry. Co. v. Merchants' El. Co.* (1922), 259 U. S. 285, 291.

## XI.

**Inasmuch as the Right of Southern Natural to Restitution From Interstate Is Incontestable for the Lack of Any Off-setting Equity as Between Interstate and Petitioner, the Proposal of Petitioner for Distribution to Ultimate Consumers Having a Molecular Interest in the Fund Would Expose Interstate to a Heavy Penalty of Which It Was Not Adequately Apprised by the Terms of the Stay Order.**

By accepting the terms of the stay order as the condition to the stay, Interstate necessarily took the chance, if any, that it might be compelled to make restitution of the overcharge to those who paid it, there being no possible off-setting equity as between Interstate and its pipeline vendees, and at the same time having to suffer distribution to ultimate consumers of the stay fund paid into Court by Interstate out of its free assets. It is not the function of Southern Natural to argue that *casus*; other than to point out to the Court (a) that Southern Natural has not expressly or impliedly consented, as all vendee pipelines appear to have consented in the *Central States* case, to look to the fund there voluntarily paid into Court by Natural Gas Pipeline in discharge of its bond; and (b) that in the



exercise of the Court's discretion as to the distribution of the fund the equity of Interstate with a stake of \$2,500,000 and the prodigious cost of distribution as against a synthetic, assumed and provable equity of ultimate consumers to a total distribution of \$2.00 per capita would not seem to present a difficult problem.

### Conclusion.

The objective of petitioner is not to overrule any novel conclusion or departure in the Central States case, but to graft on the traditional equitable powers and duties exercised by the Courts of Appeal in review proceedings under the Natural Gas Act a rigid, administrative, automic and non-judicial formula which can be properly described as being by Robin Hood, out of Rube Goldberg.

The procedure giving rise to the imaginary evil fancied by petitioner has been within the knowledge of Congress, session after session, without suggestion of amendment from any source, including petitioner.

The formula proposed in this proceeding is frankly predicated on doubt whether Congress is competent to deal with the imaginary *casua* or the Courts can be trusted for the provident exercise of their judicial functions.

The formula proposed is unsound and unnecessary; and it is submitted that the petition for writ, instead of being limited to the Central States case should have been directed at the line of established precedents cited above; and should be dismissed.

Respectfully submitted,

FORNEY JOHNSTON,

JOS. F. JOHNSTON,

First National Building,

Birmingham 3, Alabama,

Attorneys for Respondent, Southern

Natural Gas Company.



## APPENDIX.

### Analysis of the Natural Gas Pipeline Refund.

(128 Fed. [2d] 481, 129 Fed. [2d] 515, 131 Fed. [2d] 137,  
134 Fed. [2d] 265, 141 Fed. [2d] 27, 324 U. S. 138.)

Analysis of the proceeding in the matter of the Natural Gas Pipe Line Fund demonstrates the confusion, lost motion and administrative detail involved in the effort to rationalize the "ultimate consumer" theory, even where those who have paid the overcharge consent that distribution may be passed along.

The above noted formal hearings and opinions reflect only a part of the controversy over consumer distribution, in that matter.

In the Natural Gas Pipe Line controversy, Natural Gas gave bonds, in connection with a temporary stay order and temporary injunction, "to secure *the refund to purchasers at wholesale* of the amounts respectively due them if the court should sustain the reduction of rates ordered"—324 U. S. at p. 140. That penalty was the conventional and appropriate condition for stay, whether required by a bond or a fund. The bonds made no reference to ultimate consumers, and on the appeal on which the rate reduction order was finally sustained, Natural Gas Pipe Line suggested the theory that since ultimate consumers (for whose benefit it urged the Natural Gas Act was adopted) could not get the refund through retroactive rate regulation of the distributors who would realize the refunds, since the refunds would relate to past business, the wholesale customers covered by the bond should not get the refund. The Court declined to consider the ultimate consumer suggestion (Fed. Power Com. v. Natural Gas Pipeline, 315 U. S. 575, at p. 598). Thereupon various ultimate consumers brought suits against Natural Gas. The latter

then petitioned the Court to take jurisdiction of the entire matter of refund and to determine its full liability both on the bonds and by reason of the stay. This the 7th Circuit did, reciting that petitioner (Natural Gas), its customers (the distributing companies), the Federal Power Commission, the Illinois Commerce Commission and those filing the independent suits were all in substantial accord to the effect that the excess charges ought to be "refunded" to the ultimate consumers. *Natural Gas Pipeline Co. v. Fed. Pow. Comm.*, 128 Fed. (2d) 481. Notwithstanding the 7th Circuit's recital that all of these companies who had been compelled to pay the excess rate had agreed that distribution should go to ultimate consumers, Central States Electric responded to the 7th Circuit's opinion of May 22, 1942, which took comprehensive jurisdiction over the entire fund, by writing the Clerk on June 23, 1942, claiming the excess paid by it. As of the following day the 7th Circuit rendered its opinion that the ultimate consumers were entitled (June 30, 1942, 129 Fed. 2d 515; 324 U. S. at p. 141).

On July 1, 1942 Natural Gas Pipeline paid into Court the excess (324 U. S. 141) amounting to \$6,377,913.52 (131 Fed. [2d] 138) and on September 2, 1942, the Court issued its show-cause order for distribution of the entire fund to elaborately analyzed "eligible consumers," excluding those who burned gas industrially or commercially or for the purpose of heating, according to no known or conceivable principle (except, presumably, that the Court would not have extended the reduction to those classifications if it were a rate making authority with jurisdiction to readjust the utilities' rates).

Other distributions to customers of impounded stay funds, made with the consent of the distributing companies who paid the overcharges, have been on a much less laborious and arbitrary basis, as demonstrated in this

proceeding in the case of the Louisiana utilities. That simplification is necessarily based on consent.

The point is that in the absence of consent any formula for diversion of the refund from those who paid the overcharges and for its distribution to ultimate consumers not in privity as to the rate or the overcharge, is arbitrary and beyond the jurisdiction or judicial discretion of the court.

Examination of the opinions in 128 Fed. (2d) 481, in 129 Fed. (2d) 515, and in 131 Fed. (2d) 137, will disclose that the 7th Circuit attached significance to the Federal Power Commission's conclusion that distribution of overcharges should be made to consumers. And the cost and continued confusion of this procedure is further demonstrated by still another opinion in the case (134 Fed. [2d] 265) in which the Court finds itself confronted with the necessity, not of adjudicating a legal or equitable claim, but of considering the tax consequences of various alternatives. In that opinion the court restated the fallacy which the Supreme Court could not follow, viz., that "the proceedings which were instituted by Federal Power Commission \* \* \* to reduce the natural gas cost to the utilities were for the benefit of the consumers \* \* \* most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers. \* \* \* An exception is the Nebraska City utility \* \* \* It entertains the old and outmoded conception of utility magnates and utility counsel which overlooked the trustee status of a public utility," etc., etc.

Not being enabled to use the consent formula in the case of the non-consenting utility, the Court after further unhappy steps (324 U. S., p. 142) turned the amount of the latter's overcharges over to the various municipalities, without prejudice to the utility's "making claim of ad-

justment." This was the 7th Circuit's disposition of the matter, with which the Supreme Court could not agree.

That proceeding is a classic illustration of the lack of realism in allowing Natural Gas Pipeline to use the Court to deal with a fund which was a function of the distributors who were entitled to it.

### The Panhandle Eastern Fund (Eighth Circuit.)

- The Eighth Circuit in the Matter of the Panhandle Eastern Fund (154 Fed. [2d] 909), directed return of the fund to those immediately and primarily entitled (in that case distributing companies) for adjustment by them with ultimate claimants in accordance with state law. Substantially the same procedure was indicated by the Supreme Court in the Central States Case, with an interval of delay.

In the case of *Panhandle Eastern v. Fed. Power Comm.*, 324 U. S. 635. (143 Fed. [2d] 488), certain of the distributing companies entitled to the refund disclaimed in favor of their consumers, but the Eighth Circuit did not in its final order undertake to make redistribution to consumers. It left the question of ultimate liability where it belonged, if it belonged anywhere—with the distributors, who received refunds as might be established under state law or by voluntary action.

In that proceeding the stay order had provided for the impounding "for the benefit of the ultimate consumers or of petitioners" (Panhandle and affiliated distributors) "as in this litigation may be determined entitled thereto." See original stay order entered December 7, 1942, set out in 154 Fed. (2d) 909. Sections 1, 2 and 4 of that order improvidently contemplated that if the reduced rates were sustained, distribution would be to ultimate consumers. The fund reflected overcharges "collected by Panhandle

from distribution companies. Most of these distributors \* \* \* have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sale of gas to them by Panhandle belongs to their customers. 154 Fed. (2d), at p. 910.

In the *Panhandle Case* the court issued an order to show cause as to distribution (Dec. 12, 1945). Panhandle asked to be relieved of the expense of distribution to ultimate consumers of \$25,000,000 fund. This expense was estimated at more than a \$1,000,000. The 8th Circuit (majority opinion) stated that when the stay order was granted on condition that Panhandle pay the expense of distribution, Panhandle "neither objected to the conditions nor sought review of the Court's action in impounding them, but under the interlocutory injunction enjoyed for three years the suspension \* \* \* of the Commission's order."

The 8th Circuit considered that it had the right to condition the stay on such terms as would protect "all—including the public—whose interests the injunction might affect," on the supposed authority of the *Morgan Case*, 307 U. S. 1211.

The Supreme Court does not agree to this effect of the *Morgan Case* (*Central States Case*) and it seems clear that the function of an injunction bond (or stay fund) is to protect those who would suffer proximate and justiciable damage from the stay.

There are observations in the majority opinion of the 8th Circuit [154 Fed. (2d), at page 911, sub-div. (1)] which indicate that the Court considered that it could waive or impose liability on Panhandle for interest on payments into the fund. So far as the fund is concerned (which has no proper function save as security it doubtless could—and certainly it could limit interest so far as the order gratuitously ran for the benefit of the general

public or ultimate consumers having no vested rights but no such discretion as to the fund, or interest on the fund, could impair the independent right of those who are entitled to restitution both as to principal and interest.

**Opinion Authorizing Order Entered October 8, 1946.**

United States Circuit Court of Appeals,  
Eighth Circuit.

No. 12,466.

Panhandle Eastern Pipe Line Company, a  
corporation, Illinois Natural Gas Com-  
pany, a corporation, and Michigan Gas  
Transmission Corporation, a corporation,  
Petitioners,

vs.

Federal Power Commission, City of Detroit,  
Michigan, County of Wayne, Michigan,  
Michigan Consolidated Gas Company, a  
corporation, and Michigan Public Service  
Commission,

Respondents.

Before Sanborn, Woodrugh and Riddick, Circuit Judges.

Per Curiam.

This Court has been confronted with a conflict of views relative to the disposition of so much of the fund impounded under the stay order of December 7, 1942, as is claimed by distributors. Those who have spoken in the interests of the ultimate consumers have urged this Court to retain that part of the fund in question until the distributors who claim it have established their alleged exclusive rights in state courts of competent jurisdiction. Those representing the distributors contend, in reliance upon the case of Central States Electric Co. v. City of Muscatine,



324 U. S. 138, that so much of the fund as is allocated to the claiming distributors, should be turned over to them without further delay and without the imposition of any burdensome conditions.

The stay order of December 7, 1942, which established the impounded fund, provided that the fund should be held "for the benefit of the ultimate consumers or of petitioners (Panhandle Eastern Pipe Line Company) as in this litigation may be determined entitled thereto." The litigation involved the validity of an order of the Federal Power Commission reducing the wholesale rates being charged by Panhandle for gas sold by it to distributors which was resold by them at retail to ultimate consumers. The order of the Commission did not purport to affect retail rates charged by the distributors. No ultimate consumer and no distributor now claiming the right to participate in the fund was, at the time the stay order was entered by this Court, a party to the litigation. As to all who were not parties, the stay order was an *ex parte* order made to preserve the status quo and to indemnify those who would be injured by the stay of the rate reduction order of the Federal Power Commission if that order was ultimately held to be valid.

While, at the time the stay was granted, this Court evidently assumed that it would be the customers of the distributors who would be injured by the granting of the stay, the Court did not and could not then adjudicate or declare that the fund should belong and be distributable solely to ultimate consumers or to Panhandle. The Court was not attempting, at the time the stay order was entered, to determine who might ultimately be entitled to the fund impounded, nor was it attempting to cut off or affect the legal or equitable rights, in the fund, of those not parties to the litigation. The question before the Court then, was

whether the application of Panhandle for a stay of the order of the Commission should be granted, and, if so, what terms and conditions should be imposed upon Panhandle in connection with granting the stay applied for.

From a strict legal standpoint, the fund is made up solely of overcharges in wholesale rates collected by Panhandle from distributors which were required to pay the unreduced wholesale rates during the impounding period. The ultimate consumers of gas furnished by Panhandle to distributors have been prejudiced by the stay order only to the extent that the rates which they paid distributors for the gas during the impounding period exceeded the rates which the consumers would have paid had no stay order been entered. The equities of consumers, therefore, depend upon whether they would have paid less for gas during the impounding period if the reduction in wholesale rates ordered by the Federal Power Commission had become effective in accordance with the terms of the rate reduction order. The distributors which have filed disclaimers of any interest in the impounded fund have, in effect, conceded that, but for the stay order, the reduction in wholesale rates ordered by the Federal Power Commission would have been passed on by such distributors to their customers, and that these customers are therefore exclusively entitled to so much of the impounded fund as was contributed by the disclaiming distributors.

Whether the customers of a distributor which is claiming the exclusive right to a refund of the overcharges paid by it are entitled to have or to share in the contribution which that distributor made to the fund is, under the ruling of the Supreme Court in the Central States Electric Co. case, *supra*, a question of state law to be determined by the courts of the state. We think that, *prima facie*, the contribution of such a distributor is returnable to it.

Our conclusion is that it will be to the advantage of all those who are interested in that portion of the impounded fund which is claimed by distributors to turn it over to such claimants upon terms and conditions which will protect the rights, if any, of ultimate consumers and will enable them to enforce such rights as they may have against the distributors, in the state courts. These distributors are solvent and the funds in their possession will be as accessible to persons claiming superior rights as the funds would be if retained by this Court. The amount contributed by each such distributor has been definitely ascertained and is not in dispute. Interest on the amounts will not be allowed, since the funds impounded have been invested at less than one per cent interest and this Court has ordered that the earnings of the impounded fund be applied to expenses of distribution.

Appropriate orders will be entered to effectuate the conclusions reached.

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SUPREME COURT, U.S.

No. 109 188

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In the  
Supreme Court of the United States

OCTOBER TERM, 1948

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PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,  
PETITIONER,

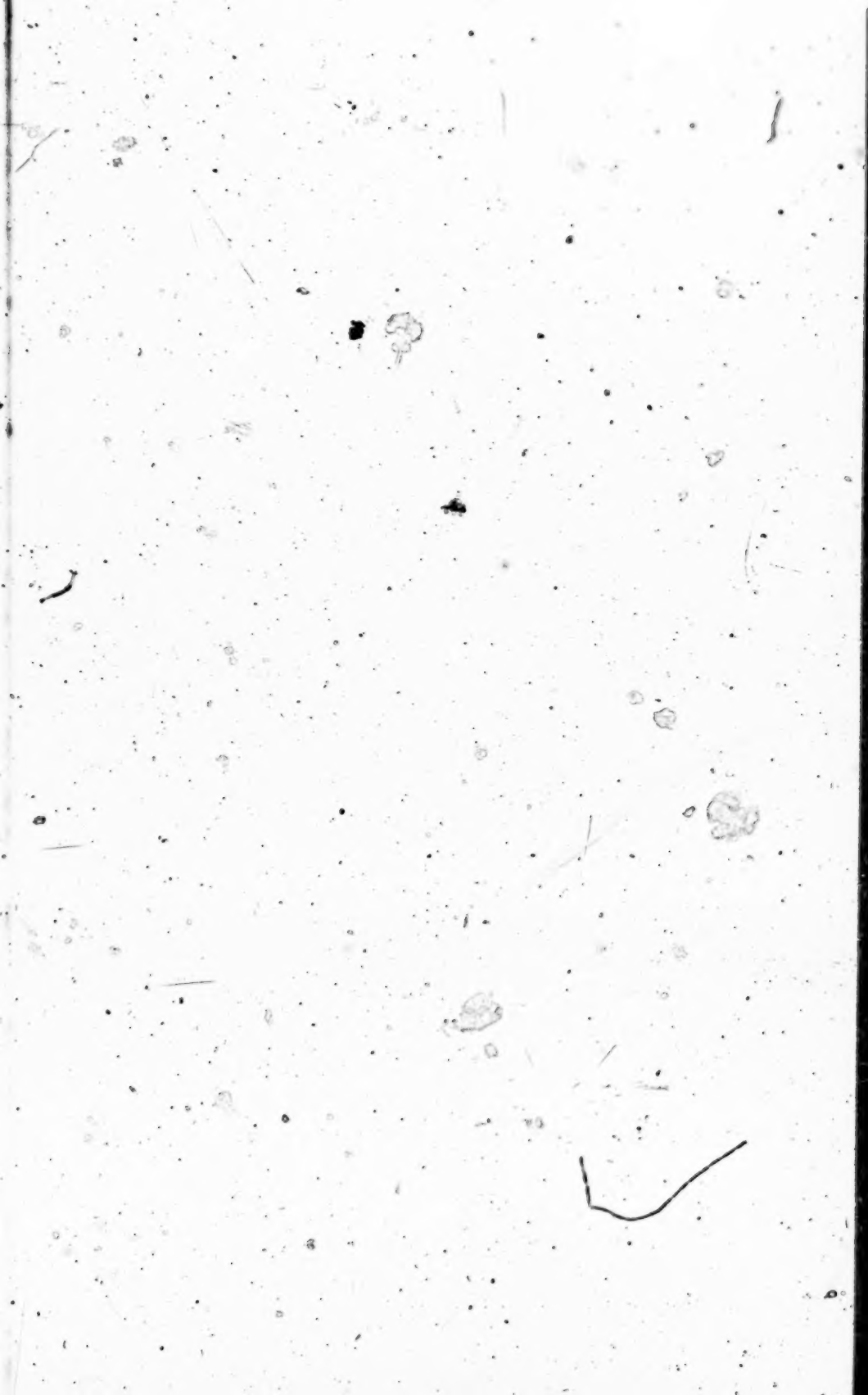
v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED,  
ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

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In the  
Supreme Court of the United States

OCTOBER TERM, 1948

No. 109\*

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,  
PETITIONER,

vs.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, ET AL.; RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT\*\*

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Public Service Commission of the State of Missouri, the legally constituted Commission for

\*Since this number has been assigned to the same cause (*Federal Power Commission, et al. v. Interstate Natural Gas Co., Inc.*), it is used by this petitioner.

\*\*The record of the proceedings in the court below has been filed in this court in the same cause (*Federal Power Commission et al. v. Interstate Natural Gas Co., Inc.*, No. 109) by the Solicitor General of the United States on behalf of the Federal Power Commission, and the same is hereby adopted, as submitted, by your petitioner. No separate record accompanies this petition for the reason it would be a mere duplicate of the record now on file. References herein to the record are made to the record as submitted by the Solicitor General on behalf of the Federal Power Commission.

the regulation of public utilities operating in the state of Missouri, respectfully shows:

I.

**Summary and Short Statement of Matter Involved**

**Summary:** A fund of \$2,765,205, representing the difference between the wholesale interstate rates prescribed by the Federal Power Commission (hereinafter referred to as the Commission) and the rates actually charged and collected by the Interstate Natural Gas Company, Incorporated, (hereinafter referred to as Interstate) has accumulated pursuant to a stay order issued by the court below pending judicial review of the order of the Commission directing Interstate to reduce its wholesale interstate rates for natural gas. After the order of the Commission was sustained by this court in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, the gas company moved in the court below for an order directing the distribution of the accumulated fund. In spite of the provision of the original stay order that the money was "to be returned to the ultimate consumers of the gas or other persons \* \* \* as contemplated by the provisions of the Natural Gas Act," the court below considered itself compelled by this Court's decision in the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers of the gas from Interstate. The purchasers themselves were natural gas companies as defined by the Natural Gas Act and thus subject exclusively to the jurisdiction of the Federal Power Commission in respect to their wholesale sales. Their rates during

the impoundment period had been found by the Commission to have been excessive without regard to the lower costs which would result from the reduction of the rates of Interstate, and during or immediately prior to the impoundment period their rates were ordered reduced to reasonable levels.

Your petitioner seeks to have the opinion of the court below reviewed on the grounds:

1. That the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, does not compel distribution of the accumulated fund to the immediate purchasers of gas from Interstate Natural Gas Company, Incorporated, as a matter of law.

2. If the *Central States* case does compel such distribution of the accumulated fund, then the rationale of that case should be reexamined and either modified or disapproved.

**Short Statement:** The history of the case may be briefly stated as follows:

The Federal Power Commission issued its order on April 27, 1943, requiring Interstate Natural Gas Company, Inc., to reduce its rates on and after May 15, 1943, by \$1,100,345 per annum as applied to its 1941 volume of sales. 3 F. P. C. 416, 432, 434-435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F. P. C. 1018.<sup>1</sup> On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit a petition for re-

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1. The Commission modified its order to reduce the amount of the rate reduction by \$8,762 to \$1,091,583, and postponed the effective date to June 15, 1943.

view of so much of the Commission's order as pertained to its rates on sales for resale to Mississippi River Fuel Corporation (hereinafter referred to as Mississippi), Southern Natural Gas Company (hereinafter referred to as Southern Natural), and United Gas Pipeline Company (hereinafter referred to as United Gas), the latter company buying gas for the account of Memphis Natural Gas Company (hereinafter referred to as Memphis). The Commission had found the rates on the above sales to be excessive in the amount of \$596,320 per year. The circuit Court of Appeals for the Fifth Circuit denied the petition for review, Judge Waller dissenting; (*Interstate Natural Gas Company Inc., v. Federal Power Commission*, 156 F. (2d) 949) and this Court, on June 16, 1947, affirmed, 331 U. S. 682. Interstate's petition for a rehearing by this court was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October, 1947.

Ancillary to its petition for review in the Circuit Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. The stay was granted on June 14, 1943, on condition that Interstate pay into the court's registry the monthly difference between payments under the existing rates and those required under the Commission's order (R. 1, 2). The entire expense of impounding the funds was placed upon Interstate, and it was provided by the stay order that no interest should be charged Interstate unless allowed by the court upon application (R. 2).

The stay order further provided (R. 42):

"The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act."

\* \* \* \* \*

Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

Pursuant to the stay order, Interstate deposited \$2,444,573 in the registry of the court. Some \$320,000 more not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay order. (R. 43, 52, 75)

On December 18, 1947, subsequent to this court's denial of rehearing, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for the account of Memphis, and Memphis. (R. 16-19)<sup>2</sup> All four companies thereupon moved to intervene in the proceeding (R. 42-48, 49-54, 71-81, 100-103), and intervention was allowed (R. 67). United Gas claimed an allocable share on behalf of Memphis to which it had resold the gas purchased from Interstate

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2. The sales of natural gas to United Gas involved in that portion of the Commission's order which was reviewed covered the period from June 1, 1943, to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

(R. 100). The other purchasing companies, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged that under *Central States Electric Co. v. City of Muscatine*, 324 U. S. 438, the court had no choice but to distribute the monies to them subject to whatever rights the ultimate consumers might have under state law. Your petitioner, the Public Service Commission of Missouri, the Illinois Commerce Commission, the Memphis Light, Gas and Water Division of the City of Memphis, and the City of Jackson, Tennessee, also intervened (R. 68-71, 92-95, 21-41, 81-87). The Missouri Public Service Commission and the Federal Power Commission urged in opposition to the claims of the purchasing companies that the *Central States* case was not here applicable since the claiming companies were "natural gas companies": whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. Your petitioner further pointed out that voluntary rate reductions and Federal Power Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess.

Mississippi River Fuel Corporation is the pipe line which purchased gas from the Interstate Natural Gas Company, Incorporated, and resold it at wholesale in Missouri. During the impoundment period the Federal Power Commission issued an order requiring Mississippi to reduce its wholesale rates for gas, and in that order of the Federal Power Commission, there was a provision that if the Commission's order in the *Interstate Natural*



*Gas Company* case was upheld, Mississippi should further reduce its rates by the amount withheld.

In the court below your petitioner pointed out that, in Missouri, the distributing companies (Laclede Gas Light Company, St. Louis County Gas Company, (now merged with Laclede Gas Light Company) and the Missouri Natural Gas Company) consented to an order by the Public Service Commission of the State of Missouri requiring said companies to disclaim any interest in the impounded monies and to agree to pass on to their customers these funds in such manner as the Public Service Commission of the State of Missouri might direct. Had the court below ordered the money given the ultimate consumers as was provided in the original order, we would not have been confronted with any claim by the distributing companies because of the previous actions of the Missouri Public Service Commission. The path had been cleared for the return of the money to the consumer.

The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the monies which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof." (R. 105) The court, accordingly, entered an order directing that the fund be dis-

tributed to Interstate's immediate purchasers, in accordance with the terms of its opinion. (R. 109-112)

## II.

### Jurisdictional Statement

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 359, §347) invests the Supreme Court with jurisdiction to require by certiorari that the causes sought to be reviewed shall be certified to it.

The date of the judgment or decree sought to be reviewed is May 12, 1948. The date of the opinion by the Circuit Court of Appeals for the Fifth Circuit is also May 12, 1948, and it is recorded at 166 F. (2d) 796.

## III.

### The Questions Presented

This proceeding presents the following questions, namely:

1. Does the *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, compel the distribution of the accumulated funds to the immediate purchasers of gas from the Interstate Natural Gas Company, Incorporated, as a matter of law?

2. If the *Central States* case so provides, should the rationale thereof be reexamined and modified or disapproved?

## IV.

### Reasons for Granting the Writ

The petitioner contends that the court below erred in holding that it was required by *Central States Electric Co.*

*v. City of Muscatine*, 324 U. S. 438, to order the distribution of accumulated fund to Interstate's immediate purchasers for the following reasons:

(1.) The immediate purchaser of gas in the *Central States* case was a local distributing company subject to regulation, if at all, only in accordance with local Iowa law, whereas the immediate purchasers of the gas in the instant case are natural gas companies subject to regulation by the Federal Power Commission under the Natural Gas Act.

(2.) The court below by holding the *Central States* case applicable to this situation has deprived the ultimate consumers of any means of testing the right of the immediate purchasers of gas to retain this fund, and has given the immediate purchasers of the gas an undeserved windfall.

(3.) The result of the decision of the court below is to render nugatory the steps taken by the Public Service Commission of the State of Missouri to effect distribution of that portion of the accumulated fund due Missouri consumers.

(4.) The *Central States* case is distinguishable in that the terms of the stay order there involved are fundamentally different from the terms of the stay order in the instant case.

(5.) The *Central States* case is further distinguishable in that the distributing company claiming its allocable share contended that it had not earned a fair rate on its investment during the impoundment period. In the instant case there is no question of the immediate purchasers having earned less than a fair rate.

*Discussion:*

1. In the *Central States* case the immediate purchaser of the gas was a local distributing company subject to regulation only in accordance with local Iowa law. This Court there held that a federal court had no power to determine whether or not the funds accumulated pursuant to its stay order, pending review of a Commission order directing the natural gas company to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or its customers, "that being a legislative function of the state of Iowa" (pp. 143-144). The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intra-state distribution and sale" (p. 144).

Here the immediate purchasers are natural gas companies within the meaning of, and subject to, the Natural Gas Act and the question presented is whether the *Central States* decision deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated funds to anyone but these immediate purchasers. There is nothing in the rationale of the *Central States* case requiring such a result for in this case the question does not arise out of conflicting claims of a local distributing company and its customers, a matter which this court treated as being subject to state control. The immediate purchasers in the instant case are themselves Natural Gas Companies engaged in the transportation or sale at wholesale of natural gas in interstate commerce and are subject to regulation only by the Federal Power Commission. *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498. The activities of these immediate purchasers are not local in character and are not subject to

state regulation, even in the absence of Congressional action. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83. In fact, it was the absence of state regulatory power in this field that prompted the Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610.

No question of local law is involved in the instant case in regard, at least, to the claims of Interstate's immediate purchasers as against more remote purchasers. The only question between the immediate purchasers and the more remote purchasers who resell is the reasonableness of rates enjoyed by natural gas companies, and this is not a question of local law. In fact, a local law question could not arise if the claimants were the immediate purchasers and the ultimate consumers (i.e., the remote purchasers who do not resell), because that situation would arise only when the companies selling to the ultimate consumers have disclaimed and thereby eliminated the local law question. It follows that under such circumstances there would have been no interference with the rate regulatory jurisdiction of any state had the court below refused to distribute the accumulated fund to Interstate's customers.

2. Since the state has no authority over the impounded funds, the consequence of the opinion of the court below is to deprive the ultimate consumers of any means of testing the right of the immediate purchaser.

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to retain the fund. If the court below is without power to order the funds distributed either to the local distributing companies or the ultimate consumers, the parties to whom the excessive charges have been passed on, the immediate natural gas companies have received an undeserved windfall. In spite of the nominal preservation of the court below "of the rights, if any, of the ultimate consumers or others to hold said companies to account in respect" of the accumulated fund, there is no power in any person or tribunal to compel these companies to pass on any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers because the ultimate consumers purchase from the distributing companies. The distributing companies are without legal rights in the fund, since the rates charged them during the impoundment period were legal rates charged all customers. Section 4(c) of the Natural Gas Act, 15 U. S. C. 717c(c); cf. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370, 384. The Federal Power Commission is without power to affect these rates because it cannot fix retroactive rates nor can it issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission v. United Gas Company*, 317 U. S. 456. For that reason, the Commission may not require the purchasing companies to pass on the benefits of the stay order. Also, under the decisions of this court the state regulatory commissions, including your petitioner, are powerless to compel these companies to disgorge that portion of the refunds attributable to their interstate sales of gas at wholesale. *Public Utilities Commission v. United Gas Co.*, *supra*, at



468; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298;  
cf. *Public Utilities Commission v. Atleboro Steam Co.*, 273  
U. S. 83; *Illinois Gas Co. v. Public Service Co.*, 314 U. S.  
498.

The effect of the extension of the *Central States* case in the instant situation is to take the excess over the fair return allowed by the Commission from one natural gas company and give it to another which is already earning a fair return. It denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefit.

3. Anticipating that the accumulated fund would be ordered distributed in such a way as to enable the ultimate consumer of the gas to obtain reimbursement of the excess amounts paid by him for the gas, the Public Service Commission of the State of Missouri published its order, which was consented to by the distributing companies, requiring said distributing companies to disclaim any interest in the impounded fund and to agree to pass on to their customers these funds in such manner as the Missouri Public Service Commission might direct. However, the decision of the court below in ordering the fund distributed to the immediate purchasers of the gas, said purchasers being natural gas companies not subject to the jurisdiction of the state, has deprived the local authority of its means of effecting the distribution of the fund to the local consumer and has rendered nugatory the steps previously taken. As a result of the decision of the court below, no remedy is now available to the ultimate purchaser to recoupe the excess charges paid by him for the gas and the statutes,

both state and federal, enacted for his protection have been rendered impotent.

4. The *Central States* case is distinguishable from this case in that the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i.e., the immediate purchasers, rather than the ultimate consumers. Here, however, the stay order recognized that the ultimate consumers had a claim in the impounded fund. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas or other persons to whom the court shall find the same should be returned, as contemplated, by the provisions of the Natural Gas Act," and full jurisdiction to cancel or modify the order "to protect or promote the rights and interests \* \* \* of the ultimate consumers or parties financially interested in the impounded funds" was reserved by the court. From the wording of the stay order, it is apparent that the court below intended, when it entered the order, to distribute the fund to the ultimate consumers.

5. In the *Central States* case the distributing company claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period, and it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. Here, however, the Commission, immediately before the Interstate rate order and while it was suspended during the four years that it was being reviewed, investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured

voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of the purchased gas which would result when and if that order was sustained.. *United Gas Pipe Line Co.*, 3 F.P.C. 402, *Memphis Natural Gas Co.*, 3 F.P.C. 566; *Southern Natural Gas Co.*, 5 F.P.C. 427, 662 (order allowing rate schedules); *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 363.

If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but for the stay order. Cf. *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 359, 363.

If, notwithstanding the considerations set forth above, the Court is of the opinion that the *Central States* case extends to the situation here presented, then we submit that this Court should reexamine the rationale of that case and so modify it as to eliminate the injustice which presently is resulting from the impact of that decision on the disposition of funds accumulated under stay orders granted for the financial protection of "natural gas companies" which desire to challenge rate reduction orders of the Commission.

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review, here four years,

must be distributed to the natural gas company's immediate purchasers, which claim their share of the fund, without regard to whether these claimants are natural gas companies or local distributing companies, or to whether they earned a reasonable return during the impoundment period. For that period, we submit, not only are the ultimate consumers of gas deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612), but the Natural Gas Act is perverted into a law which "exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, 146, 151 (dissenting opinion)).

Moreover, a requirement that the accumulated fund must be turned over to the immediate purchasers without regard to the surrounding circumstances, offers, we submit, a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds, where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N. J.) owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co. v. Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250-254; Vol. II, pp. 706, 723. Where

affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

**Wherefore**, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 10,701, *Interstate Natural Gas Company, Inc. v. Federal Power Commission, et al.*, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated July 31, 1948.

Attorneys for Petitioner:

CHARLES L. HENSON

*Public Service Commission,*

*State of Missouri*

*Jefferson City, Missouri*

JOHN P. RANDOLPH

*General Counsel,*

*Public Service Commission,*

*State of Missouri*

*Jefferson City, Missouri*

No. 188

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*In the*  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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PUBLIC SERVICE COMMISSION OF THE STATE  
OF MISSOURI, PETITIONER,

v.

INTERSTATE NATURAL GAS COMPANY, INCOR-  
PORATED, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the  
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE  
OF MISSOURI, PETITIONER,

v.

INTERSTATE NATURAL GAS COMPANY, INCOR-  
PORATED, ET AL.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

JURISDICTION.

The order of the Court of Appeals was entered on May 12, 1948 (R. 109-112). The petition for a writ of certiorari was filed on August 2, 1948, and granted on October 11, 1948 (R. 118). The jurisdiction of this Court rests upon 28 U. S. C. 1254.

STATEMENT.

This case is a companion case to Federal Power Commission, Petitioner v. Interstate Natural Gas Company,

Inc., et al., No. 109, and has been consolidated with that case, and also Memphis Light, Gas and Water Division, Petitioner v. Interstate Natural Gas Company, Inc., et al., No. 209, and Illinois Commerce Commission, Petitioner v. Interstate Natural Gas Company, Inc., et al., No. 212, for purposes of presentation and argument to the Court.

The issues and questions presented in each of these cases are identical and to file a separate brief in this case would be merely repetition of the brief filed in No. 109 by the Solicitor General of the United States:

Therefore, for the purposes of this case the brief of the Solicitor General of the United States in Federal Power Commission, Petitioner v. Interstate Natural Gas Company, Inc., et al., No. 109 is adopted in toto as the brief of Public Service Commission of the State of Missouri, and each and every statement of fact, argument, conclusion of law, citation of authority, and conclusion contained in the said brief of the Solicitor General of the United States is hereby concurred in and adopted as such in behalf of the Public Service Commission of the State of Missouri, Petitioner in this cause.

Respectfully submitted,

JOHN P. RANDOLPH,

General Counsel,

Public Service Commission,

State of Missouri.

*Attorney for Petitioner.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1948.

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No. 188.  
PUBLIC SERVICE COMMISSION OF THE  
STATE OF MISSOURI

v.  
INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

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No. 209.  
MEMPHIS LIGHT, GAS AND WATER DIVISION

v.  
INTERSTATE NATURAL GAS COMPANY, —  
INCORPORATED, et al.

---

No. 212.  
ILLINOIS COMMERCE COMMISSION

v.  
INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.

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**MEMORANDUM OF SOUTHERN NATURAL  
GAS COMPANY IN OPPOSITION.**

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Attorney for Southern Natural Gas Company.

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IN THE  
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---

**MEMORANDUM OF SOUTHERN NATURAL  
GAS COMPANY IN OPPOSITION.**

**Statement.**

Southern Natural Gas Company has heretofore filed its answer and brief in opposition to the petition for writ of certiorari filed by the Federal Power Commission in No.

109. The answer and brief so filed are adopted by Southern Natural Gas Company by way of response to the petitions in No. 188 (Public Service Commission of the State of Missouri), No. 209 (Memphis Light, Gas and Water Division) and No. 212 (Illinois Commerce Commission), with respect to which the following comment is added.

**No Standing for Petition as to Southern Natural Gas Company.**

Neither the Public Service Commission of the State of Missouri (188) nor the Memphis Light, Gas and Water Division (209) nor the Illinois Commerce Commission (212) has jurisdiction over any sale within the transmission or distribution area of Southern Natural Gas Company. Nor do any of the authorities mentioned represent or have any standing to intervene or petition with respect to any purchaser or consumer of gas from Southern Natural Gas Company or any ultimate consumer of gas transported by Southern Natural Gas Company.

For that reason, so far as concerns the refund to Southern Natural Gas Company ordered by the Circuit Court of Appeals for the Fifth Circuit, none of the above mentioned petitioners for writ of certiorari have any justiciable interest in the matter.

If and to the extent that the above named petitioners might or do contend that as a result of agreement with any other pipe line company which purchased from Interstate or as a result of rate proceedings under the Natural Gas Act or otherwise, to which the respective authorities and such other pipe line companies were parties, rights were created with respect to other pipe line companies affording a basis for petition for certiorari, such contention could not possibly relate or extend to so much of the order of the Fifth



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Circuit as relates to distribution to Southern Natural Gas Company.

Southern Natural Gas Company had no agreements or relations with any of the petitioners above designated. Therefore, if conceivably any of the petitions for writ of certiorari filed by the designated authorities should be granted, it is respectfully asserted that the writ should exclude any effect, bearing or consideration upon the order of distribution as to Southern Natural Gas Company.

**Federal Power Commission Also Without Standing  
as to Writ.**

It is also the position of the latter company that the Federal Power Commission (Petitioner in No. 109) is likewise without any justiciable right to seek or obtain a writ of certiorari in so far as Southern Natural Gas Company is concerned.

It is submitted that if and to the extent that the Federal Power Commission has any standing or jurisdiction with respect to the rates or revenues of Southern Natural Gas Company, such jurisdiction is limited to proceedings under the Natural Gas Act and confers no right to oblique or indirect proceedings to accomplish a retroactive reduction in the rates to which Southern Natural Gas Company became entitled when the order of the Federal Power Commission reducing the rates of Interstate Natural Gas Company and others was affirmed.

Precisely as the Missouri and Illinois Commissions and the Memphis Light, Gas and Water Division have no right to insist by petition for certiorari in this proceeding, or otherwise than an *amici curiae* in the Court below, that an extra territorial order relating to Southern Natural Gas

Company is inequitable or unjust, the Federal Power Commission clearly has no right to insist that a Circuit Court of Appeals should bypass the vested right of Southern Natural Gas Company to refunds and make distribution to ultimate consumers of gas purchased directly or immediately from Southern Natural Gas Company in respects as to which the Federal Power Commission has no jurisdiction whatever.

The petitions of the above designated petitioners emphasizes precisely, as was apparent from the petition of Federal Power Commission in No. 109, that the relief sought, viz., distribution of the impounded overcharge to the ultimate consumers who purchased, down stream, would necessarily cast upon the Circuit Court of Appeals the function of a rate making authority to determine or assume that the re-sale rates in effect from time to time by the purchasers from Interstate and the re-sale rates of subsequent transmission or distributing companies in the well-to-market process were excessive to the exact extent of the overcharge.

### **No Occasion Presented for Reviewing Central States Case.**

Each of the above named petitions over-states the supposed compulsion upon the Circuit Court of Appeals of the decision in Central States Electric Company v. City of Muscatine, 324 U. S. 138.

We pointed out in our answer to the petition in No. 109 that there is nothing in the opinion or decision of the Circuit Court of Appeals to indicate that the order of distribution was compelled by the Central States Case.

The order of the Circuit Court of Appeals reserves all justiciable rights of all parties. It is obvious on the face

of this record that if granted, the respective petitions for writ of certiorari would involve the Circuit Court of Appeals in an unrelated series of rate hearings of great complexity and cost wholly unsuited to the functions of the Courts of Appeal.

Each of the petitions for writ of certiorari is predicated upon the untenable assumption that at the time, and at all of the times, during which the overcharges were being exacted under the stay order, the respective purchasers from Interstate were receiving so full and fair a return as that, in a plenary rate hearing involving that period, public authority having jurisdiction could and would have lawfully reduced the rates of the pipe lines accordingly.

We have pointed out that no such assumption is tenable, particularly as to Southern Natural, for a number of reasons, among others, the controlling reason that only a portion of its gas was purchased by Southern Natural from Interstate and that a large part of the gas purchased by Southern Natural Gas Company from Interstate was transmitted and sold by Southern Natural directly to industries for consumption and not for resale, and was therefore not subject to regulation as to the rate by Federal Power Commission; nor is there any suggestion in this record that Southern Natural Gas Company was subject to regulation as to those direct sales by any state or local authority. Thus the petition for writ seeks to impose on the Court of Appeals the function of a rate hearing or a "constitutional return" hearing which neither the Federal Power Commission nor any other administrative authority could initiate.

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## Certiorari Is Not Appropriately Sought in These Petitions.

Petitioners are undertaking to obtain retroactive procedural relief, as to a detailed provision of a stay order entered in 1941, or, rather, retroactively to substitute a stay order running specifically in favor of ultimate consumers rather than in favor of those entitled as of right to refund of overcharges held to have been improperly exacted. That is not a proper objective of a petition for writ within the purview of Supreme Court Rule 38 (5).

There is present here neither substantial diversity nor public importance in the result. No ultimate consumer, industrial or otherwise, intervened in an effort to bypass the refund around the pipe lines entitled to it.

The petitions in their aggregate effect represent a gratuitous effort to have molecular amounts distributed to hundreds of thousands of ultimate consumers through the machinery of the Fifth Circuit.

There is no basic or important principle involved. The Circuit Courts of Appeals can in every instance where stay is requested under the Natural Gas Act give full and intelligent consideration to every argument and factor advanced by petitioners.

What petitioners seek to assure by these proceedings is an inflexible rule that no stay should be granted unless the Courts of Appeal shall undertake the function of distribution of the impounded funds to ultimate consumers in all cases, regardless of the particular circumstances. This would impose upon the Courts of Appeal an extraordinary rigidity, which is contrary to the public interest.

That objective is not within the intent of Rule 38 (5) as interpreted and applied by this Court.

The petition for writs of certiorari thus take no cognizance of the fact that they are directly or impliedly insisting upon the exercise by the Fifth Circuit of a function and jurisdiction with respect to which both the petitioners and the Circuit Court of Appeals are wholly without authority.

Respectfully submitted,

FORNEY JOHNSTON,

Attorney for Southern Natural  
Gas Company.

September, 1948.

LIBRARY  
SUPREME COURT, U. S.

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No. 109

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948

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**FEDERAL POWER COMMISSION, ET AL,**

**Petitioners,**

**vs.**

**INTERSTATE NATURAL GAS COMPANY,  
ET AL**

**Defendants.**

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**PETITION OF MEMPHIS LIGHT, GAS & WATER  
DIVISION FOR A WRIT OF CERTIORARI TO  
THE U. S. CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

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No. 109

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948.

FEDERAL POWER COMMISSION, ET AL,

Petitioners,

vs.

INTERSTATE NATURAL GAS COMPANY,  
ET AL,

Defendants.

PETITION OF MEMPHIS LIGHT, GAS & WATER  
DIVISION FOR A WRIT OF CERTIORARI TO  
THE U. S. CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

Your petitioner, Memphis Light, Gas & Water Division, an arm or branch of the government of the City of Memphis, Tennessee, created by Chapter 381 of the Private Acts of Tennessee for the year 1939, prays that a writ of certiorari issue to review the order of the U. S. Circuit Court of Appeals for the Fifth Circuit directing the ~~distribution~~ of impounded funds entered in the above entitled case on May 12, 1948.

## **OPINION BELOW**

The opinion of the U. S. Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 Fed. 2nd 796.

## **JURISDICTION**

The order of the Circuit Court of Appeals was entered on May 12, 1948 (R. 109-112). The jurisdiction of this Court is invoked under the provision of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## **QUESTIONS PRESENTED**

Your petitioner adopts and incorporates herein as a part of its petition the petition of the Solicitor General on behalf of the Federal Power Commission filed with the record herein on June 21, 1948, and, for the purpose of brevity, does not copy herein said petition including specifically the questions presented, statement, specifications of error and reasons for granting the writ, but for the purpose of further presenting its interest in said controversy, submits the following:

## **SUPPLEMENTAL STATEMENT AND ADDITIONAL REASONS FOR GRANTING WRIT.**

Petitioner, Memphis Light, Gas & Water Division, is owned by the citizens and residents of Memphis, Tennessee, to whom it sells and distributes at retail natural gas at rates fixed by the City of Memphis, and neither your petitioner nor said City are subject to regulatory control either by the Federal Power Commission or the Railroad and Public Utilities Commission of the State of Tennessee. (R. 25).

Petitioner purchases its requirements of natural gas from the Memphis Natural Gas Company, Inc., whose pipe lines connect with those of United Gas Pipe Line Company and Interstate Natural Gas Company. (R. 25). The rates at which Memphis Natural sells petitioner gas are subject to control by Federal Power Commission and, in fixing the rates to be charged petitioner in 1943, by its opinion No. 104 dated September 21, 1943, had in mind the reduction of Interstate Natural Gas Company's rates involved in this proceeding, as shown by the following quotation from that opinion:

"The Company also purchases gas from Interstate Natural Gas Company, Inc. During the course of the negotiations the Commission issued its investigation of the Interstate Natural Gas Company, Inc. (Docket No. G-149). This order is now in litigation. Representatives of the Company have stated, however, that any future benefit the Company may receive by reason of the aforesaid rate-reduction order will be passed on to its customers." (R. 27 and 28.)

By its intervention, claiming title to certain of the funds (R. 42-47), Memphis Natural repudiates or denies this agreement.

Of the funds impounded and now to be distributed, \$387,347.00 was paid by your petitioner and its owners and customers. (R. 26 and 30.)

The Court below, following *Central States v. Muscatine*, 324 U. S. 138, ordered refund to the distributing pipe line companies "such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof." (R. 105.) Such order, although stating expressly to the contrary, is cer-

tainly, with prejudice to and a foreclosure of the rights of your petitioner who paid to Memphis Natural Gas Company \$387,347.00 of the money paid by it to the United Pipe Line. The Court below, having impounded the fund, is now the only court who can see to it that this money is returned to petitioner. There is no state statute in Tennessee permitting any suit by petitioner against the Memphis Natural Gas Company for this overpayment. The rate of Memphis Natural was expressly fixed in 1943, as shown by the opinion of the Federal Power Commission, upon the understanding that any future benefits of the reduction of Interstate's rates would be passed on to its customers. The rates paid by petitioner to Memphis Natural were thus fixed by the Federal Power Commission in accordance with this understanding, and the Federal Power Commission is now without power to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U.S.C. 717 d; Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591. Therefore, unless it is now held that the Court below incorrectly interpreted Central States v. Muscatine, or unless said decision is modified, the ultimate consumers are without remedy for obtaining the refund of the overpayment. This results in some intermediary company's obtaining an unlooked-for windfall, and is violative of the principles of the Natural Gas Act for the protection of ultimate consumers. Until Central States v. Muscatine, there was never any doubt about the ability of a court to relieve any injustice following the issuance of any of its process. Inland Steel Company v. U. S., 306 U.S. 153; U. S. v. Morgan, 307 U.S. 183.

We submit that this is still the law and that the interpretation placed upon Central States case is erroneous and should be by this Court corrected.

5  
**CONCLUSION.**

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari, and the petition of the Federal Power Commission for such a writ, should be granted.

MEMPHIS LIGHT, GAS & WATER DIVISION  
By CHAS. C. CRABTREE,

Attorney..

WESLEY W. HARVELL  
Of Counsel.

August, 1948.



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No. 209.

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1948

MEMPHIS LIGHT, GAS & WATER DIVISION,

Petitioner,

vs.

INTERSTATE NATURAL GAS COMPANY,

Incorporated, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES C. CRABTREE,

Attorney for Memphis Light,  
Gas and Water Division.

WESLEY W. HARVELL

of Counsel.

---

No. 209

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

MEMPHIS LIGHT, GAS & WATER DIVISION,  
Petitioner,

vs.

INTERSTATE NATURAL GAS COMPANY,  
Incorporated, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

## B R I E F .

Now comes the Memphis Light, Gas & Water Division, petitioner in this cause, and states to the Court that its position in the matter is clearly and distinctly stated in its petition for certiorari filed herein, together with the authorities upon which it relies.

Your petitioner further shows that the issues presented by its petition are identical with those presented in causes Nos. 109, 188 and 212, which have been consolidated with

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this petition. Your petitioner has just received page proof of the brief on behalf of Federal Power Commission prepared by the Solicitor General of the United States, which fully covers all of the points and authorities upon which your petitioner relies, and your petitioner for the sake of brevity here adopts and incorporates said brief on behalf of the Federal Power Commission in Cause No. 109 as and for its brief and statement of points and authorities in this petition. Your petitioner further relies upon any additional points or authorities which may be presented by the petitioners in causes Nos. 188 and 212.

For the reasons stated in the original petition for certiorari filed by your petitioner, and in the briefs adopted and incorporated herein, your petitioner respectfully urges that the judgment of the lower court is erroneous and should be reversed and corrected by this Court.

CHARLES C. CRABTREE,  
Attorney for Memphis Light,  
Gas and Water Division.

WESLEY W. HARVELL  
of Counsel.  
December, 1948.

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SUPREME COURT, U. S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1943.

No.

ILLINOIS COMMERCE COMMISSION, et al.,  
*Petitioners.*

VS.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al.,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

GEORGE F. BARRETT,

Attorney General of the State of Illinois,  
208 South La Salle St., Chicago 4, Ill.

*Attorney for Petitioners.*

ALBERT E. HALLETT,

Assistant Attorney General,

*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1948.

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No.

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ILLINOIS COMMERCE COMMISSION, et al,  
*Petitioners,*

vs.

INTERSTATE NATURAL GAS COMPANY,  
INCORPORATED, et al,  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

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The Attorney General of the State of Illinois, as attorney for and on behalf of the Illinois Commerce Commission, an administrative agency of the State of Illinois, which Commission is charged by the laws of said State (Ill. Rev. Stat., 1947, Ch. 111, pars. 1-110.9) with the regulation of public utilities, including those selling natural gas, and, as a matter of law (*In re Englehard & Sons Company*, 231 U. S. 646, 650-652; *New York City v. New York Telephone Company*, 261 U. S. 312, 315-316; *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 592), represents all Illinois

consumers affected by the order in this case (some 60,000 consumers in 37 communities), prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Fifth Circuit to review its order of May 12, 1948, which, in substance, directed that certain impounded funds (amounting to some \$2,765,205) be distributed only to the immediate purchasers of the Interstate Natural Gas Company, who were themselves natural gas companies, rather than to the ultimate consumers (R. 109-110).

*Certiorari* is concurrently being sought in this same matter by the Solicitor General of the United States, on behalf of the Federal Power Commission (No. 109 of this term), and by the Public Service Commission of the State of Missouri (No. 188 of this term), and it may well be that the administrative agencies of various other States and Cities will file similar petitions.

### THE OPINION BELOW.

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The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 Fed. (2d) 796.

### JURISDICTION.

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The order of the Circuit Court of Appeals for the Fifth Circuit was entered on May 12, 1948 (R. 109-112). The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. §§ 347, 350).

## A SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On April 27, 1943, the Federal Power Commission (hereinafter called the Commission) ordered the Interstate Natural Gas Company, Incorporated (hereinafter called Interstate) to reduce its rates on and after May 15, 1943, by \$1,100,345 per annum as applied to its 1941 volume of sales (3 F.P.C. 416, 432, 434-435) and on June 9, 1943, denied Interstate's petition for rehearing (3 F.P.C. 1018<sup>1</sup>).

On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit its petition for a review of so much of the Commissioner's said order as pertained to its rates on sales for resale to the Mississippi River Fuel Corporation (hereinafter called Mississippi) the Southern Natural Gas Company (hereinafter called Southern Natural), and the United Gas Pipe Line Company (hereinafter called United Gas) for resale to the Memphis Natural Gas Company (hereinafter called Memphis) which rates the Commission had found to be excessive in the amount of \$596,320 per year.<sup>2</sup> Ancillary to this petition for review, Interstate, on June 14, 1943, sought and was granted a stay of the operation and effect of the said rate reduction order pending review thereof on the condition that Interstate pay into the court's registry the monthly difference between the existing rates and those required by the Commission's rate reduction order (R. 1-2). This stay order placed the entire expense of impounding such funds upon Interstate, and provided that no interest be charged Interstate unless the court so ordered upon subsequent application.

<sup>1</sup> The Commission did, however, modify its order by \$8,762 to \$1,091,583 and postponed the effective date to June 15, 1943.

<sup>2</sup> By stipulation, Interstate withdrew such of its assignments of error as related to the balance of the Commission's said rate order.



This stay order (R. 2) also expressly provided that:

"The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same shall be returned; as contemplated by the provisions of the Natural Gas Act. \* \* \*

"Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds."

Subsequently Interstate's said petition for review was denied (*Interstate Natural Gas Company v. Federal Power Commission*, 156 Fed. (2d) 949). On June 16, 1947, this Court affirmed (331 U. S. 682) and on October 13, 1947, this Court denied rehearing (332 U. S. 785).

The reduced rates were finally put into effect commencing with deliveries for the month of October, 1947. Meanwhile, pursuant to the terms of the said stay order, Interstate had deposited some \$2,444,573 in the registry of the court and admitted that an additional \$320,000, not paid into the registry, was due under the terms of the stay order, making a total to be distributed of some \$2,765,205 (R. 43, 52, 75, 110, 111).

On December 18, 1947 Interstate moved the court below for an order distributing the said impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis and Memphis (R. 16-19).

The sales of natural gas to United Gas involved in that portion of the Commissioner's order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Tenn., it made its purchases directly from Interstate.

The said four companies were permitted to and did intervene (R. 42-48, 49-54, 65-67, 67, 71-81). United Gas claimed an allocable share on behalf of Memphis to which it had resold the gas it had purchased from Interstate (R. 100). The other three purchasers, Mississippi, Southern Natural and Memphis, claimed their allocable share for themselves, and all four urged, relying upon *Central States Co. v. City of Muscatine*, 324 U. S. 138 and the unreported *per curiam* decision of the Eighth Circuit in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, that the court had no choice but to distribute the fund to them, subject to whatever rights the ultimate consumers might have under state law.

The present petitioner, Illinois Commerce Commission, and other administrative agencies of other States and Cities, also were permitted to and did intervene (R. 21-41, 67, 68-71, 81-87, 92-95). They and the Commission urged, in opposition to the claims of the four purchasing companies, that the *Central States* decision was not controlling and that the funds in question should be distributed equitably among the ultimate consumers of the gas, from whom such funds had originally been collected, and should not be paid over to the immediate purchasers, who had acted but as intermediaries in the entire transaction of furnishing natural gas to the public. It was also pointed out and urged that the said four immediate purchasers were themselves "natural gas companies" within the scope of the Natural Gas Act, whose rates for transportation and sale at wholesale were not subject to local regulation, and that the various voluntary rate reduction orders entered during the impoundment period showed that these four companies had been and were still earning not less than a reasonable rate of return on their interstate business, without the benefit (windfall) of the impounded excess. The petition of

Illinois Commerce Commission also alleged in detail that a portion of the funds in the custody of the court had originally been contributed by consumers of gas public utility services in the State of Illinois and paid, in the form of rates for such service, to two local Illinois public utility companies under its jurisdiction and control, namely, the Illinois Power Company, and the Union Electric Power Company, of Illinois; and that the natural gas so consumed and paid for by the said Illinois consumers was gas furnished by Interstate through the facilities of Mississippi, which latter corporation acted only as an intermediary which had resold such gas to the aforesaid two Illinois public utilities which had resold it to Illinois consumers. It also tendered the assistance of its technical staff in formulating a plan for the distribution of such funds to the ultimate consumers and pointed out that such distributions to the ultimate consumers has successfully been effected in previous cases such as *Natural Gas Pipeline Company*, *Colorado Interstate Gas Company* and *Panhandle Eastern Pipe Line Company* (R. 68-69).

The court below, citing only the *Central States* case, held (R. 105) that:

"whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipe line companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of any ultimate consumers or others to hold said companies to account in respect thereof."

The lower court, accordingly, on May 12, 1948, entered its order directing that the said fund be distributed to Interstate's immediate purchasers (R. 109-111).

## THE QUESTIONS PRESENTED.

The questions presented in the case at bar are in substance as follows:

Where, as here, (a) a "natural gas company" (Interstate), ancillary to its petition for a review of an order of the Federal Power Commission reducing its wholesale gas rates, secures a stay of the enforcement of such order, conditioned upon its depositing monthly the excess of its charges over the rates as so ordered reduced, the stay order expressly providing that such impounded funds are "to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act"; (b) the said petition for review is subsequently denied and such denial is affirmed by this Court; (c) meanwhile, under the provisions of such stay order, a substantial fund (here some \$2,765,205) has been impounded; (d) the immediate purchasers (Mississippi, Southern Natural, United Gas and Memphis) are themselves "natural gas companies" within the scope of the Natural Gas Act, whose rates for transportation or sale of natural gas at wholesale in interstate commerce are not subject to State or local regulation; and (e) it appears that such immediate purchasers were at all times receiving at least a fair return without the benefit of such impounded excess:

(1) Does the *Central States* decision, as a matter of law, compel the distribution of the said accumulated fund to Interstate's immediate purchasers rather than to the ultimate consumers of such gas, who originally contributed such funds in the form of excessive charges? And, if so,

(2) Should the said *Central States* decision now be re-examined and either be modified or disapproved?

**SPECIFICATION OF ERRORS TO BE URGED.**

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that this Court's decision in the said *Central States* case was applicable and controlling under the facts of the case at bar?

2. In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to the immediate purchasers of natural gas from Interstate.

3. In ordering the distribution of the fund accumulated under its stay order to the immediate purchasers of natural gas from Interstate.

4. In failing to order that, after appropriate notice and hearings, the funds accumulated under its stay order be distributed directly to the ultimate consumers of such natural gas.

REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.

I.

IN HOLDING THAT IT WAS REQUIRED BY THIS COURT'S DECISION IN THE CENTRAL STATES CASE TO ORDER THE DISTRIBUTION OF THE ACCUMULATED FUNDS TO INTERSTATE'S IMMEDIATE PURCHASERS, THE CIRCUIT COURT OF APPEALS HAS IMPROPERLY EXTENDED THE DOCTRINE OF THAT CASE TO THE DISSIMILAR FACTS OF THE CASE AT BAR AND HAS THEREBY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, PRECISELY SETTLED BY THIS COURT, OR HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) Since in the case at bar, but not in the cited case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the Central States case was not applicable or controlling.

(b) Since in the case at bar, but not in the cited case, it affirmatively appears that the immediate purchasers were at all times, during the period of the fund's accumulation receiving at least a fair return, the Central States case was not applicable or controlling.



(c) Since in the case at bar, but not in the cited case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act", the Central States case was not applicable or controlling.

(d) The question whether this Court's decision in the Central States case should be extended to cases such as this is a matter which has not been, but should be precisely settled by this Court.

## II.

**THE CENTRAL STATES CASE, PARTICULARLY IF IT EXTENDS TO CASES SUCH AS THIS, IS INCONSISTENT WITH THE EARLIER DECISIONS OF THIS COURT, DEFEATS THE OBVIOUS INTENT OF THE CONGRESS IN ENACTING THE NATURAL GAS ACT, ENCOURAGES EVEN FRIVOLOUS LITIGATION AND SHOULD NOW BE RE-EXAMINED BY THIS COURT AND EITHER MODIFIED OR DISAPPROVED.**

(a) The Central States Case, Particularly If It Extends to Cases Such as This, Is Inconsistent With the Earlier Decisions of This Court.

(1) In proceeding to review rate reduction orders of the Federal Power Commission, the jurisdiction of a Circuit Court of Appeals is not appellate but original in character, and it has the same wide powers commonly exercised by courts of equity hearing suits for injunctions.

(2) Where a fund has been created by virtue of the entry of a stay order by a Federal court, that court acquires

exclusive jurisdiction to adjudicate the rights of all persons claiming any interest in that fund, even though such persons may not have been parties to the original litigation in that court or in privity with such parties.

(b) The Central States Case, Particularly If It Extends to Cases Such as This, Defeats the Obvious Intent of the Congress in Enacting the Natural Gas Act.

(c) The Central States Case, Particularly If It Extends to Cases Such as This, Encourages Even Frivolous Litigation.

(d) The Central States Case, Particularly If It Extends to Cases Such as This, Should Now Be Re-examined by This Court and Either Modified or Disapproved.

The foregoing reasons for granting the writ are more fully developed in the appended brief in support of this petition (*ante*, pp. 12-36).

### CONCLUSION.

For the reasons above stated, the Illinois Commerce Commission, petitioner herein, prays that this petition for a writ of *certiorari* be granted, and that a writ of *certiorari* issue to the Circuit Court of Appeals for the Fifth Circuit to review its order of May 12, 1948, in *Interstate Natural Gas Company, Incorporated, v. Federal Power Commission, et al.*, its Docket No. 10,701.

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## BRIEF IN SUPPORT OF THE FOREGOING PETITION.

## I.

IN HOLDING THAT IT WAS REQUIRED BY THIS COURT'S DECISION IN THE CENTRAL STATES CASE TO ORDER THE DISTRIBUTION OF THE ACCUMULATED FUNDS TO INTERSTATE'S IMMEDIATE PURCHASERS, THE CIRCUIT COURT OF APPEALS HAS IMPROPERLY EXTENDED THE DOCTRINE OF THAT CASE TO THE DISSIMILAR FACTS OF THE CASE AT BAR AND HAS THEREBY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, PRECISELY SETTLED BY THIS COURT, OR HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

(a) Since in the case at bar, but not in the cited case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the Central States case was not applicable or controlling.

The court below, in holding that it was required by *Central States Electric Co. v. City of Muscatine*, 324 U. S. 435, to order the distribution of the accumulated fund to Interstate's immediate purchasers, improperly extended the *Central States* case to the dissimilar facts of the case at bar.

In the *Central States* case, this Court held that a federal court had no power to determine whether the funds accumu-

lated pursuant to its stay order, pending review of a Commission order directing a "natural gas company" to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or to its customers, "that being a legislative function of the State of Iowa" (pp. 143-144). In that case, the immediate purchaser was a local distributing company, subject to regulation, if at all, only in accordance with local Iowa law. The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intrastate distribution and sale" (p. 144).

The question in this case is whether the *Central States* decision applies where the immediate purchasers are themselves "natural gas companies" within the meaning of, and subject to the Natural Gas Act, and deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated fund to any one but these immediate purchasers.<sup>1</sup> Nothing in the rationale of the *Central States* decision requires such a result. For in this case the question does not arise out of conflicting claims of

<sup>1</sup> If it is not deemed mandatory to distribute the impounded fund to the immediate purchasers, a substantial proportion of the fund will probably reach the ultimate consumers. The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, voluntarily filed a disclaimer of its allocable share (R. 86-87) and the intervention of the Missouri Public Service Commission stated that Laclede Gas Light Company would also disclaim its share in favor of its ultimate consumers (R. 93-94). When the *United Gas* costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which in turn passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission v. Interstate Natural Gas Co., Inc., et al.*, F.P.C. Docket Nos G-149 and G-132, Order of June 26, 1944.

Experience in other similar distribution proceedings where the percentage of disclaimers, although progressively decreasing, has until this case usually been very high (e.g., 99.5% of the fund disclaimed in the *Natural Gas Pipeline* refund, which was the first such proceeding, and which gave rise to the *Central States* case; 80% in the *Panhandle* refund proceeding), also indicates that other distributing companies would probably also disclaim. The two Illinois distributing companies involved, viz.: Illinois Power Company and Union Electric Power Company, have stated their intention to disclaim all interest in the fund.

a local distributing company and its customers, a matter which this Court treated as being subject to state control. Rather, the immediate purchasers here are themselves "natural gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce which is subject to regulation only by the Commission. *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498. These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610.

There is no question of local law here involved, at least in regard to the claims of Interstate's immediate purchasers as against the more remote purchasers. As between the immediate purchasers and more remote purchasers who resell, the only question is the reasonableness of the return enjoyed by "natural gas companies"—not a question of local law. Nor could a local law question arise if the claimants were immediate purchasers and more remote purchasers who do not resell (i. e., ultimate con-

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<sup>5</sup>The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b); *Colorado Interstate Co. v. Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U. S. 507, various state commissions have indicated an intention to assert jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text of this petition are applicable to any portion of the impounded fund allocable to these industrial sales.

sumers) because that situation would come into being only when the company selling to the ultimate consumers has disclaimed and thereby eliminated the local law question. Hence there could have been no interference with the rate regulatory jurisdiction of any state if the court below had refused to distribute the accumulated fund to Interstate's customers.<sup>6</sup>

The consequence is not only that the states have no authority over the funds impounded in this case. Unless the court below can order the sum distributed to persons other than the immediate purchasers, presumably to the ultimate consumers to whom the overcharges had apparently been passed on, there is no way in which the intermediate "natural gas companies" can be prevented from retaining an undeserved windfall. For despite the nominal preservation by the court below "of the rights, if any, of the ultimate consumers or others to hold said companies to account in respect" of the accumulated fund,<sup>7</sup> no power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or distributing

<sup>6</sup> The court below, we believe, could properly have permitted the filing of claims in opposition to those of the immediate purchasers, and ordered the distribution of the impounded funds in accordance with the respective merits of these claims. Cf. *United States v. Morgan*, 307 U. S. 183, 197; *Inland Steel Co. v. United States*, 306 U. S. 153, 157; *Central States Co. v. City of Muscatine*, 324 U. S. 138, 146 (dissenting opinion). If any complicated economic or accounting questions had arisen in connection with the reasonableness of rate charged during the impoundment period, the Commission could have provided the Court with any assistance it needed. Cf. *United States v. Morgan*, *supra*; *Atlantic Coast Line v. Florida*, 295 U. S. 301, 312-313; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 618-619. The Illinois Commission, which has had wide experience in such refunds, also tendered the assistance of its technical staff (R. 68-69).

<sup>7</sup> It is interesting to note in this connection that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. Nor, for that matter, has anything happened as the result of the reservation of such rights in the unreported proceedings in the Eighth Circuit in the *Panhandle* distribution. This is in part due to the fact that, typically, state commissions, as the Commission here, have no retroactive rate jurisdiction or reparation power.



companies any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from the distributing companies. ~~The distributing companies~~ are without legal rights on the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4(c) of the Natural Gas Act, 15 U. S. C. 717C(c); cf. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 384. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission v. United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their interstate sales of gas at wholesale. *Public Utilities Commission v. United Gas Co.*, *supra*, at 468; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498.

Thus the result of the extension of the *Central States* case is to take the excess over the fair return allowed by the Commission from one "natural gas company" and give it to another which is already earning a fair return. It effectively denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefits.

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the *cited*

case, the immediate purchasers were themselves "natural gas companies" within the purview of the Natural Gas Act, whose rates for the transportation and sale of natural gas in interstate commerce are not subject to regulation by the States, the *Central States* case was not applicable or controlling.

(b) Since in the case at bar, but not in the cited case, it affirmatively appears that the immediate purchasers were at all times, during the period of the fund's accumulation receiving at least a fair return, the *Central States* case was not applicable or controlling.

In the *Central States* case, the distributing company, claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period and, accordingly, it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. In the present case, however, the Commission, immediately before the issuance of the Interstate rate order and while it was suspended during the four years that it was being reviewed, investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi, and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of purchased gas which would result when and if that order was sustained. *United Gas Pipe Line Co.*, 3 F. P. C. 402; *Memphis Natural Gas Co.*,

<sup>8</sup> As the result of conferences with the Commission, United Gas, on April 1, 1943, filed amendatory contracts affecting a reduction of rates for resale gas in the sum of \$2,195,287, annually, based upon its 1942 revenues. 3 F.P.C. 402.

3 F. P. C. 566;<sup>9</sup> *Southern Natural Gas Co.*, 5 F. P. C. 427, 662 (order allowing rate schedules);<sup>10</sup> *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 363.<sup>11</sup> If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but for the stay order. Cf. *In the Matter of Mississippi River Fuel Corp.*, 4 F. P. C. 340, 359, 363.

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the *cited* case, it affirmatively appears that the immediate purchasers were at all times during the period of the fund's accumulation receiving at least a fair return, the *Central States* was *not* applicable or controlling.

<sup>9</sup> The Commission, as the result of conferences with Memphis, issued an opinion dated September 21, 1943, more than five months after the Interstate order, accepting as of July 26, 1943, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about \$350,000. 3 F.P.C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate Order would be passed on to its customers. 3 F.P.C. at 570. In the court below, the company disputed the correctness of that statement. In 1946, Memphis filed new schedules increasing its rates. Various of its customers protested the increase and the Commission suspended the new rates. 5 F.P.C. 946. Memphis subsequently withdrew its proposed schedules.

<sup>10</sup> The Southern Natural order was entered on July 19, 1946, pursuant to a stipulation between the Commission and the company, and required the company to file new rate schedules which, as applied to its sales for the year ending December 31, 1945, would reduce revenues by \$1,200,000.

<sup>11</sup> The Mississippi order, entered November 9, 1945, required the company to reduce its revenue on regulable business by approximately \$950,000 as applied to the test year 1943. After judicial review and remand of the case to the Commission (163 F. 2d 433 (App. D. C.)), the company and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate investigation against the company, and Mississippi in turn accepted a rate reduction of about \$850,000, and further agreed to give effect to that portion of the Interstate rate order accruing since January 20, 1946. No express proviso was made for that portion which had accrued previously, and presumably it was to be disposed of as the courts should direct.

(c) Since in the case at bar, but not in the cited case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act", the *Central States* case was not applicable or controlling.

This Court's decision in the *Central States* case is also clearly distinguishable by the fact that the terms of the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i. e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court apparently intended, when it entered that stay, to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided that the fund should be returned to "such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act," and further it reserved to itself full jurisdiction to cancel or modify the order "to protect or to promote the rights and interests \* \* \* of the ultimate consumers or other parties financially interested in the impounded fund."

As a matter of fact, the terms of the stay order in the case at bar are far more analogous to those involved in the case of *Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, where this Court, at pages 516-518, said:

"The bond recognized that the city and its officials, who were the nominal parties defendant, were in a broad sense the representatives of the consumers, the

parties actually concerned. It recognized that they were required to pay a rate for gas higher than the city ordinance had determined to be just and reasonable; that these excess charges were being exacted pending the suit, in order that the company might be secure in the event that it should prevail, and per contra, that they ought to be refunded with interest, in the event that it should fail. It recognized that the customers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due to them, to see to its collection from the Company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause to retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate.

"The case is within the principle of *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 143-147.

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection." (Emphasis added.)

In view of these considerations, it is respectfully submitted that since in the case at bar, but *not* in the cited case, the stay order under which the funds accumulated expressly provided that such funds were "to be returned to such ultimate consumers of gas, or other persons to whom the Court finds the same should be returned, as contemplated by the Natural Gas Act," the *Central States* case was *not* applicable or controlling.

(d) The question whether this Court's decision in the *Central States* case should be extended to cases such as this is a matter which has not been, but should be precisely settled by this Court.

In this type of case not only huge sums (in *Panhandle Eastern Pipeline* some \$25,000,000; in *Natural Gas Pipeline* some \$6,350,000; here some \$2,765,000) but many thousands of ultimate consumers (in *Natural Gas Pipeline* some 1,000,000; here some 60,000 in Illinois alone) are affected by the ultimate decision of the Circuit Court of Appeals in distributing the accumulated funds.

Such proceedings (*Natural Gas Pipeline, Panhandle Eastern Pipeline* and *Colorado Interstate Gas Co.*) have been before the Seventh, Eighth and Nine Circuits respectively; and, in each of those cases, the accumulated funds were successfully refunded to the ultimate customers although funds far larger and interests far more conflicting than those in the case at bar were involved.

If the doctrine of the *Central States* case is now to be extended to cases such as this, thus leaving the ultimate consumers, State agencies and the Commission alike completely without a remedy to prevent such an obvious injustice and perversion of the Natural Gas Act, then the question is of such importance that it should be authoritatively settled by this Court, not by any Circuit Court of Appeals.



It is therefore most respectfully submitted that in holding that it was required by this Court's decision in the *Central States* case to order the distribution of the accumulated funds to the immediate purchasers, the Circuit Court of Appeals has improperly extended the doctrine of that case to the dissimilar facts of the case at bar and has thereby decided an important question of federal law which has *not* been, but *should be*, precisely settled by this Court, or has decided a federal question of substance in a way probably in conflict with applicable decisions of this Court.

## II.

**THE CENTRAL STATES CASE, PARTICULARLY IF IT EXTENDS TO CASES SUCH AS THIS, IS INCONSISTENT WITH THE EARLIER DECISIONS OF THIS COURT, DEFEATS THE OBVIOUS INTENT OF THE CONGRESS IN ENACTING THE NATURAL GAS ACT, ENCOURAGES EVEN FRIVOLOUS LITIGATION AND SHOULD NOW BE REEXAMINED BY THIS COURT AND EITHER MODIFIED OR DISAPPROVED.**

(a) **The Central States Case, Particularly If It Extends to Cases Such as This, Is Inconsistent With the Earlier Decisions of This Court.**

(1) In proceeding to review rate reduction orders of the Federal Power Commission, the jurisdiction of a Circuit Court of Appeals is not appellate but original in character, and it has the same wide powers commonly exercised by courts of equity hearing suits for injunctions.

It might, perhaps, be thought that because this type of action is instituted in a Circuit Court of Appeals, the jurisdiction of that court is purely appellate in character.

and might; therefore, be more restricted than that jurisdiction usually exercised by a trial court reviewing an administrative order on common law *certiorari*, or hearing a suit for an injunction against the enforcement of an administrative order. 8

An examination of the relevant authorities discloses that such is *not* the case and that, despite the *rank* of such court, if sits on review of such orders as a court of *original* jurisdiction, and has all of the wide powers usually exercised by such trial courts.

Montgomery's Manual of Federal Jurisdiction and Procedure, 4th Ed., 1942, pp. 897, 906, states the general principles as follows:

"In respect of orders of federal boards and commissions, the jurisdiction of the circuit courts of appeals is *original* rather than appellate." (Citing *Butterick Co. v. Federal Trade Commission* (2 Cir., 1925), 4 F. (2d) 910, 913.) \* \* \*

"In respect of orders of federal boards and commissions, the jurisdiction of the circuit courts of appeals is *original* rather than appellate; and hence the courts may, by their own decrees, protect the rights, and in such form as is enforceable by them. Such a decree is similar to that of a *court of equity in an injunction suit*." (Citing *Butterick Co. v. Federal Trade Commission* (2 Cir., 1925), 4 F. (2d) 910, 913; *L. B. Silver v. Federal Trade Commission* (6 Cir., 1923), 292 F. 752. But see *Chamber of Commerce of Minneapolis v. Federal Trade Commission of U. S.* (8 Cir., 1922), 280 F. 45, 46.) (Emphasis added.)

In the case of *Federal Trade Commission v. Balme*, 23 Fed. (2) 615 (C. C. A., 2nd, 1928), *cer. den.* 277 U. S. 598, the Circuit Court of Appeals, in speaking of the affect of the very similar review provisions of the Federal Trade Commission Act, said, at page 618:

"The Federal Trade Commission Act confers special statutory jurisdiction, and the extent of such jurisdic-

tion and the conditions of its exercise over subjects or persons must necessarily depend upon the terms in which the jurisdiction is thus conferred. *It does not depend upon the rank of the court upon which it is conferred.* \* \* \* But, under the act, the jurisdiction of the court is *original*. *Butterick Co. v. Federal Trade Commission* (C. C. A.), 4 F. (2d) 910." (Emphasis added.)

In the case of *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, this Court, in discussing the powers of a Circuit Court of Appeals under the review provisions of the National Labor Relations Act (which are practically identical with those of the Natural Gas Act here involved), said, at page 373:

"The jurisdiction to review the orders of the Labor Relations Board is vested in a court *with equity powers*, and while the court must act within the bounds of the statute, and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action*. The purpose of the judicial review is consonant with that of the administrative proceedings itself,—to secure a just result with a minimum of technical requirements." (Emphasis added.)

In the case of *United States v. Morgan*, 307 U. S. 183, where a fund had accrued by virtue of a court action suspending an order of the Secretary of Agriculture, this Court, at page 191, said:

"\* \* \* in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373; *Inland Steel Co. v. United States*, 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to

be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles."

In view of the statutory provisions here involved and the legal principles applicable thereto, it is respectfully submitted that the powers of a Circuit Court of Appeals in connection with such review proceedings are fully as wide as those of any federal trial court sitting in equity and are not limited to the powers usually exercised by purely appellate tribunals.

(2) Where a fund has been created by virtue of the entry of a stay order by a Federal court, that court acquires exclusive jurisdiction to adjudicate the rights of all persons claiming any interest in that fund, even though such persons may not have been parties to the original litigation in that court or in privity with such parties.

The authors of *Corpus Juris*, at pages 626 and 697 of Volume 25, state the general principles as follows:

**"Ancillary and Incidental Jurisdiction.** Where a federal court has jurisdiction of the cause of action and of the parties, it may have jurisdiction also of a suit or proceeding which is a continuation of, or incidental and ancillary to, the former suit, although it might not have jurisdiction of the latter, if it were an original action. (Citing numerous cases.) \* \* \* the fact that such jurisdiction is ancillary merely does not preclude its exercise over persons not parties to the judgment sought to be enforced."

In the case of *Lafayette County Commissioners v. Moulton*, 112 U. S. 217 (1884), one Moulton had recovered a judgment in the United States Circuit Court against a certain township, based upon bonds issued by that County Commissioners on behalf of that township. After this judgment he sought the issuance of a writ of mandamus commanding the County Commissioners to assess and collect a tax and to satisfy the said judgment.

The County Commissioners contended that, since they were not parties to the original action, the Circuit Court was attempting to exercise *original* jurisdiction in an action of mandamus and was therefore without jurisdiction.

In holding that the second action was merely ancillary to the original action and was therefore within the jurisdiction of the Circuit Court even though it was directed against new parties, this Court, at page 221, said:

"The objection that the Circuit Court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the County of Labeite, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that Court. It is quite true, as is familiar, that there is no original jurisdiction in the Circuit Court in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which *Krippendorf v. Hyde*, 110 U. S. 276, is an example."

In the case of *Hoffman v. McClelland*, 264 U. S. 552, this Court, at page 558, took occasion to say that:

"It is settled that where in the progress of a suit in a federal court, property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of settling up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceed-

ing is purely ancillary. *Oklahoma v. Texas*, 258 U. S. 571, 581; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632; *Krippendorf v. Hyde*, 110 F. S. 276, 281; *Compton v. Jesup*, 68 Fed. 263, 279; *Sioux City Co. v. Trust Co.*, 82 Fed. 124, 128; *Minot v. Mastin*, 95 Fed. 734, 739; Street Fed. Eq. Pr. §§ 1229, 1245-1247, 1364."

In the case of *Central Union Trust Company v. Anderson County*, 268 U. S. 93, this Court, in reversing a lower court holding that no such jurisdiction existed, took occasion to point out, at page 96, that:

"\* \* \* The rule permitting third persons to come into suits in federal courts to enforce their claims in respect of property there impounded is stated in *Hoffman v. McClelland*, 264 U. S. 552, 558: 'It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incidental to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary.' Ancillary suits are not limited to those initiated by persons who desire to come in and have their rights determined. Such a suit may be maintained by the plaintiff in the principal suit against strangers to the record to determine a controversy having relation to the property in the custody of the court and which, in justice to the parties before the court, ought to be determined in the principal suit. See *Compton v. Jesup*, 68 Fed. 263, 284, Street, Fed. Eq. Pr. § 1248."

To the same general effect, see:

*Gunter v. Atlantic Coast Line*, 200 U. S. 273.

*Blair v. City of Chicago*, 201 U. S. 400.

*Wabash Railroad v. Adelbert College*, 208 U. S. 38, 609.



In the case of *Inland Steel Co. v. United States*, 306 U. S. 153, an order of the Interstate Commerce Commission had been suspended by a three-judge court, conditioned, however, upon the railroad's setting up the disputed charges on its books and agreeing to pay such sums over if so ordered by the court.

In discussing the powers of the court to dispose of this fund, this Court, at pages 156, 157 and 158, said:

"In the exercise of its discretion, the District Court imposed conditions in its decree granting appellant's petition for an interlocutory injunction. Appellant neither objected to the conditions nor sought review of the court's action in imposing them, but under the interlocutory injunction enjoyed for three years the suspension—which it had sought—of the Commission's order, pending litigation. Now, the litigation ended, appellant insists that the District Court lacked jurisdiction to do more than vacate its interlocutory injunction and dismiss the petition, since no pleadings of the Railroad or the Commission sought the creation of the special allowance account. *But this overlooks the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect.* \* \* \*

"\* \* \* While thus acting in the interest of a single shipper, the court properly took steps to protect the other interests—represented by the Commission—from injuries that the injunction might cause. It did so by ordering the payments, which the Commission had found unlawful, to be continued—on condition that they be segregated or paid into a separate account, pending the court's review of the Commission's finding of illegality. This segregated account thus accrued as a result of judicial restraint of administrative proceedings in which the payments had been declared unlawful. *When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it*

became the duty of the court promptly to allocate the fund to its lawful owner.

"An equity court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund. \* \* \*." (Citing *Central Kentucky v. Railroad Comm'n*, 290 U. S. 264, 271.) (Emphasis added.)

In *United States v. Morgan*, 307 U. S. 183, in discussing "the proper disposition to be made of a fund paid into the Court below pending a suit instituted in that Court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City Stockyards" (p. 185), this Court, at pages 197-198, said:

"It is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' *Arkadelphia Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. *Northwestern Fuel Co. v. Brock*, *supra*; *Ex parte Lincoln Gas & Electric Co.*, 257 U. S. 6; *Baltimore & Ohio R. Co. v. United States*, 279 U. S. 781. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See *New York Edison Co. v. Maltbie*, *supra*; *Brooklyn Union Gas Co. v. Maltbie*, *supra*; cf. *United States v. Klein*, 303 U. S. 276."

A case very similar on its controlling facts to the case at bar is the case of *Ex parte Lincoln Gas & Electric Co.*, 256 U. S. 512, where, at pages 516, 517 and 518, this Court said:

"The bond recognized that the city and its officials, who were the nominal parties defendant, were in a broad sense the representatives of the consumers, the parties actually concerned. It recognized that they were required to pay a rate for gas higher than the city ordinance had determined to be just and reasonable; that these excess charges were being exacted pending the suit, in order that the company might be secure in the event that it should prevail, and *per contra*, that they ought to be refunded with interest in the event that it should fail. It recognized that the customers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due to them, to see to its collection from the Company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause to retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate.

"The case is within the principle of *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 143-147.

"The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pend-

*ing suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection.*" (Emphasis added.)

In the dissenting opinion in *Central States Co. v. City of Muscatine*, 324 U. S. 138, it was pointed out, at page 148, that:

"\* \* \* Until today, this Court seems never to have doubted that 'it is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process'. *United States v. Morgan*, 307 U. S. 183, 107. \* \* \* That court (C. C. A., 7th) held, in impounding the fund here involved, that since it was authorized by §§ 19 (b) and (c) of the Act to issue a stay pending review of the Commission's rate order, it had a mandatory obligation as a court of equity 'to determine to whom and in what amounts the distribution shall be made.' This holding was in accord with the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect'. *Inland Steel Co. v. United States*, 306 U. S. 153, 157."

In view of these considerations, we respectfully submit that a Circuit Court of Appeals has exclusive jurisdiction over any fund which accrues by virtue of its stay order, and that it has adequate power to adjudicate the conflicting claims of the various public utilities and of the thousands of ultimate consumers to the moneys held in such a fund.

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We therefore most respectfully submit that the *Central States* case, particularly if it extends to cases such as this, is inconsistent with the earlier (and we submit sounder) decisions of this Court.

(b) The *Central States* case, particularly if it extends to cases such as this, defeats the obvious intent of the Congress in enacting the Natural Gas Act.

In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, this Court, at page 610, referring to the Natural Gas Act, pointed out that:

"The *primary* aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." (Emphasis added.)

The present proceedings, being taken under the review provisions of the Natural Gas Act, the action of the court and the commission should represent a co-ordinated action to carry out, not to emasculate or defeat, the plain objectives of that Act. This principle is well brought out in *United States v. Morgan*, 307 U. S. 183, which involved the disposition of funds accumulated by virtue of a court action suspending an order of the Secretary of Agriculture reducing rates for services at the Kansas City stockyards. There this Court, at page 191, said:

"\* \* \* in construing a statute setting up an administrative agency and providing for judicial review of its action, the court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to obtain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be constructed so as to attain that end through co-ordinated action." (Emphasis added.)

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction order is stayed pending judicial review, the funds accumulated during the period of review (here four years)

must be distributed to the natural gas company's immediate purchasers to the exclusion of the ultimate consumers who contributed such funds in the form of excessive charges for gas service; without regard to whether these immediate purchasers were themselves "natural gas companies", or whether they were earning at least a fair return on the form and conditions of the stay order.

For that (four year) period, we submit that not only are the ultimate consumers deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which was the "primary aim" of the Natural Gas Act, but that Act is perverted into a law which exploits such ultimate consumers and unjustly enriches the natural gas companies.

This thought is well set forth in the *dissenting* opinion in *Central States Co. v. City of Muscatine*, 324 U. S. 138, where it was pointed out, at pages 146 and 151, that:

"The *primary* purpose of Congress in passing the Natural Gas Act was to protect *ultimate consumers* of gas from excessive prices. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 610, 612. *The Court's decision today defeats that Congressional purpose*, for under its interpretation of the Act the petitioner, a retail gas distributor, is awarded a windfall, at the expense of the very *consumers* the Act was designed to protect.

"If my previous analysis is correct, the rule announced by the Court today means simply this: *So long as litigation can be kept pending* in the courts as to the validity of a Federal Power Commission rate reduction order, *the benefits of the Natural Gas Act will be suspended as to ultimate consumers*, and will be largely, if not exclusively, restricted to retail distributors. *Thus, by a strange quirk of statutory construction, the effort of Congress to protect consumers from excessive rates is transformed, where litigation is pending, into an Act which exploits consumers and*



unjustly enriches distributing companies." (Emphasis added.)

In view of these considerations, we most respectfully submit that the *Central States* case, particularly if it extends to cases such as this, defeats the obvious intent of the Congress in enacting the Natural Gas Act.

(c) **The Central States Case**, particularly if it extends to cases such as this, encourages even frivolous litigation.

If the holding in the *Central States* case is to be construed as requiring that, in a case such as this, all funds accumulated under a stay order pending judicial review must be distributed to the immediate purchasers, to the exclusion of the ultimate consumers who contributed such funds in the form of excessive charges, this will, we submit, furnish a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N. J.) owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co. v. Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250, 254; Vol. II, pp. 706, 723. Where affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely

to shift the amount of reduction from the treasury of one subsidiary to that of another.

In view of these considerations, we respectfully submit that the *Central States* case, particularly if it extends to cases such as this, encourages even frivolous litigation.

**(d) The Central States Case, particularly if it extends to cases such as this, should now be re-examined by this Court and either modified or disapproved.**

If, notwithstanding the considerations set forth in Point I of the fore-going Petition and in this Brief in Support, this Court is of the opinion that the *Central States* case extends to the factual situation presented in the case at bar, then we most respectfully submit that this Honorable Court should now re-examine the holding and rationale of that case and either modify or disapprove it, so as to eliminate the patent injustice which presently is resulting from the impact of that decision upon this type of cases.

That this Court has, in cases involving this same Natural Gas Act, not hesitated to modify or even disapprove of earlier decisions in this field is demonstrated in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, where this Court, at pages 606-607, disapproved its earlier contrary ruling in *United Railways Co. v. West*, 280 U. S. 234, 253-254.

We therefore most respectfully submit that the *Central States* case, particularly if it extends to cases such as this is inconsistent with the earlier decisions of this Court, defeats the obvious intent of the Congress in enacting the Natural Gas Act, encourages even frivolous litigation and should now be re-examined by this Court and either modified or disapproved.

**CONCLUSION.**

We therefore most respectfully submit that the foregoing petition for a writ of *certiorari* should be granted.

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